No. 95-1184

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner,
vs.
WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.; and MIHARA FARMS,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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403 pp

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No. CV-F-90-473 OWW
Consolidated

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

WILEMAN BROTHERS & ELLIOTT, INC.;
and KASH, INC.,
Plaintiffs,

v.

EDWARD MADIGAN, Secretary of Agriculture,
Defendant.

REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Date: March 2, 1992
Time: 9:00 a.m.
Ctrm: OLIVER W. WANGER

Defendant hereby responds to the arguments raised in plaintiffs' Opposition to defendant's Motion for Summary Judgment.

[COPY OMITTED]

Plaintiffs confusing and redundant First Amendment discussion ultimately seems to present two distinct arguments: (1) that their "compelled association" with other tree fruit handlers in a generic advertising program is unconstitutional; and (2) that the requirement to support this generic advertising program leaves less funds available for their own, brand name marketing efforts, thus restraining their commercial speech. Neither argument has any merit.

As noted previously, the "compelled association" line of cases that begins with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), simply has no applicability to a government-mandated, commercial advertising program such as this. *See* DMSJ at 53-59 and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989, *cert. denied*, 110 S. Ct. 1168 (1990).

And to the extent that plaintiffs commercial speech promoting the sale of Wileman and Kash brands is curtailed by the compelled assessments to support the promotion of California tree fruit, that limited restriction does not run afoul of First Amendment protections for commercial speech. Governmental restrictions on commercial speech are permissible so long as those restrictions reflect —

> . . . a 'fit' between the legislatures ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable; that represents not

> necessarily the single best disposition but one whose scope is in proportion to the interest served.

Fox, supra at 3035. The government program here — compelled support for a generic advertising program for California tree fruit, albeit at the potential cost of less advertising for particular brand names of fruit — certainly meets that standard.

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USCA DOCKET NO. 93-16977

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS INC.; PHILLIPS FARMS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.; and MIHARA FARMS,
Appellants,

v.

MICHAEL ESPY, Secretary of Agriculture,
Appellee.

Eastern District of California (Fresno)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

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March 30, 1994

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III. The Assessment-Fund Generic Advertising and Promotion Program Does Not Violate Appellants' First Amendment Rights

Despite appellants' attempt to split and confuse the First Amendment issue between commercial speech and the right to freedom from compelled association, there is only one First Amendment challenge presented here: Did the assessments ordered to fund the marketing orders unlawfully interfere with appellants' right to promote their brand-specific commercial message. As the District Court correctly noted, "the only goal of the speech . . . is to convince consumers to buy growers' fruit. It is purely commercial speech." Order at 54. *Accord Cal-Almond* 14 F.2d at 436, n. 5. As such it must be analyzed under the three part test of *Central Hudson Gas & Electric v. Public Service Comm'n of NY*, 447 U.S. 557, 566 (1980). The distinct nature of the California tree fruit industry, (including approximately 100 large to medium size handlers), and the extensive objective and anecdotal evidence in support of this promotional program, easily distinguishes these marketing orders from the almond program.

A. *Standard of Review.* The government submits that the *Cal-Almond* Court's suggestion in *dicta* that the "compelling state interest" standard from *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), might apply in this commercial speech context, 14 F.3d at 436, should be rejected. The only compelled association here is the mingling of appellants' funds with those of their competitors to promote a neutral, purely commercial message: buy California tree fruit.[21] This is not an appropriate case for the

[21]We agree with the District Court's conclusion that with respect to the balance of appellants' confused attempts to allege First Amendment claims — eg. that advertising promotes the "lie" that red colored fruit is better, or that the summer theme of the advertising promotes sexually subliminal messages, *see* Appellants' Brief at 12 — appellants simply

application of the *Roberts* test, which requires a compelling state interest to justify intrusion into "certain intimate human relationships," 468 U.S. at 617, such as marriage, cohabitation and the raising and education of children, *Id.* at 619. A government program compelling producers to associate to advertise the product that they produce is far from the type of state action that the *Roberts* standard is designed to scrutinize. Hence the *Roberts* line of authority has no application to the three-prong *Central Hudson* analysis.

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have not carried their burden of identifying a coherent claim or any evidence in support thereof. Order at 60-61.

No. 93-16977

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILEMAN BROTHERS & ELLIOTT, INC., ET AL.,
Plaintiffs-Appellants,

v.

MICHAEL ESPY, Secretary of Agriculture,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California

APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Cal-Almond's application of the *Central Hudson* test was seriously flawed, however, and the panel decision here perpetuates *Cal-Almond*'s central mistake. Both decisions erroneously require the Secretary to demonstrate that generic advertising is "more effective" than any advertising that an individual handler might undertake. That requirement is based on a misunderstanding of the distinct goals of generic and individual product advertising and, moreover, is utterly impractical to apply. As we show below, the panel should have analyzed this case under a variation of the test for government programs that compel association and, under that test, should have concluded that the generic advertising components of the peach and nectarine marketing orders comply with the First Amendment.

1. *Choosing the correct First Amendment test.* Even though the programs challenged here involve advertising, they are unlike the government actions at issue in the Supreme Court's commercial speech cases, which uniformly concern government *restrictions* on private speech. Here, in contrast, peach and nectarine handlers remain totally free to advertise their products as they choose. The marketing orders simply require them also to contribute to an industry-wide advertising program.[2]

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[2]Before the panel, we were bound by the Court's decision in *Cal-Almond*, applying the commercial speech test to a generic advertising program under a different marketing order. Accordingly, in our brief we analyzed the peach and nectarine generic advertising programs under *Central Hudson*, arguing that those programs were factually distinguishable from the almond advertising program. In this petition, we urge the Court *en banc* to apply what we believe is the correct constitutional test.

MINUTES
CONTROL COMMITTEE

January 18, 1996

The meeting of the Control Committee was called to order by Chairman Al Peterson at 11:00 a.m. in the conference room of the California Tree Fruit Agreement on January 18, 1996 in Reedley, California.

Mr. Field called roll.

Shipper Members and Alternates Present:

Fred Berry	Joe Garcia	Rick Paul
Wayne Brandt	Micky George	Albert Peterson
Carl Buxman	Herb Kaprelian	Stuart Rotan
Dan Frauenheim	Harold McClarty	Pat Sanguinetti
		Will Wirht

Grower Members and Alternates Present:

Leo Balakian	Rod Milton	Richard White
Verne Crookshanks	Cliff Sadoian	Gordon Wiebe
Melvin Enns	Martin Trenouth	

Others present were:

Dan Bensing	Pat Pinkham	Marilyn Watkins
Jon Field	Gary Van Sickle	
Kendall Manock	Terry Vawter	

A motion to approve minutes from the February 31, 1995 meeting was made, seconded and approved.

Plus Commodity Committee Balance Sheet

Mr. Field reviewed the Balance Sheet of the Plum Commodity Committee (attached) which indicates the bottomline estimated cash at March 1, 1996 of $25,029.25. Mr. Field noted that there was no recommendation regarding the status of Plum Commodity Committee funds at this time. However, if the Control Committee approves any payments of legal fees, the portion owned by the Plum Commodity Committee will have to be paid by the peach

and nectarine committees until any disbursement of trust account funds due the Plum Commodity Committee are made.

Mr. Field explained that moneys being held in attorney-client trust accounts on behalf of the Plum Commodity Committee exceed $850,000 not including interest. Currently, the Plum Committee's share of this interest is estimated at around $300,000.

Litigation

Mr. Field then asked for an update on legal activities from U.S. Attorney Dan Bensing and Kendall Manock of Baker, Manock & Jensen.

Mr. Bensing began by announcing that the Solicitor General has authorized petition for certiorari review to the Supreme Court on the First Amendment issues contained in Wileman vs. Espy. This petition will be submitted next week. Mr. Bensing noted that they anticipate the Supreme Court to make a decision as to whether it will hear the case in March, that the case would be briefed in the summer, argued in the fall with a decision expected by the winter of 1997.

Mr. Bensing further noted that about 70 to 80 percent of the cases presented to the Supreme Court by the Solicitor General are heard and that the only issue being considered is with respect to the First Amendment freedom of speech components of the case. Although there is a possibility that other issues raised by the plaintiffs will be heard as well, Mr. Bensing stated this was doubtful since the first area the Supreme Court examines in its decision to accept cases is the presence of conflicting decisions. It was also noted that the original deadline for submitting the case to the Supreme Court for review was December 16, 1995. The Solicitor General asked for an extension and was granted one, but the

plaintiffs, who also asked for an extension, had their request denied.

Mr. Manock added that it was a major step for the industry that the Solicitor General had recommended the case be heard by the Supreme Court. He noted that CTFA Manager Jon Field had been instrumental in working with Mark Houston and the Ag Issues Forum to initiate a letter writing Campagne aimed at convincing the Solicitor General the case had broad ranging implications for U.S. agriculture. Mr. Manock reported that letters were received by the Solicitor General from commodity groups in just about every state in the nation asking that the case be reviewed by the Supreme Court. Mr. Manock stated he believed the letter writing Campagne was key in the Solicitor General's decision to request review.

Mr. Bensing then turned to the topic of legal fees involved in the Wileman vs. Giannini anti-trust case, stating that the Control Committee had not officially addressed whether attorney fees incurred would be covered by the industry or paid by individuals. The fees have come as a result of defending parties int he District Court case in two different categories. The first category deals with the definition of "persons" under the Sherman Anti-Trust Act. It is the opinion of Assistant U.S. Attorney Bensing that the defendants in the case could not be sued as "persons" since they were serving as part of a governmental entity and therefore were exempt from the anti-trust claim as defined in the Sherman Act. However, the Department of Justice would not authorize Mr. Bensing to make that argument on behalf of the defendant. As a result, it was necessary for defendants to seek private counsel.

In the meantime, the Wileman vs. Espy Ninth Circuit ruling came down saying that it was perfectly legal and within the realm of responsibilities for the committees to set quality standards. Although we are still awaiting ultimate

resolution of that issue, it appears this ruling would nullify the anti-trust claims contained in Wileman vs. Giannini. The issue of immunity under the "person" status has still not been resolved, but legal fees remain unpaid. Mr. Bensing noted that he would be willing to seek approval for payment from the Justice Department again, but was not optimistic that would happen. The question at hand, is whether legal fees submitted by private counsel, Baker, Manock & Jensen, in the amount of $67,724.19 be paid by individuals or whether the Control Committee wishes to authorize the use of grower assessment dollars for this payment.

Mr. Manock stated his position that it is unfair for individual committee members to pay, particularly since the Ninth Circuit ruled that setting standards was proper. The argument made to the Anti-Trust Division of the Justice Department was that the lack of immunity for program committee members and staff and the resulting possibility for law suits would discourage anyone from wanting to serve on the committees.

Mr. Field noted that the immunity issue has broad impact on all marketing orders and commissions throughout the country and agreed that the individuals should not be required to pay legal fees for this defense.

When asked what it would take to fully resolve the issue of "person" status, Mr. Manock responded that it was likely that issue would not be resolved with the Wileman vs. Giannini case, since it was highly possible the case would end once the Ninth Circuit ruling that standards set were proper and legal is finalized. However, he noted that defendants may want the "person" issue resolved in the event of further litigation.

Mr. Sadoian asked how likely it was that the Justice Department would allow USDA to pay attorney fees? Mr. Bensing responded that he would be willing to ask

again, but that we should assume that will not happen. Mr. Sadoian then asked if it was possible to collect attorney fees from the plaintiffs. Mr. Manock responded that this was not allowed.

The discussion then turned to the second category of legal fees involving the motion to disqualify the law firm of Thomas E. Campagne because it had represented some of the defendants in previous proceedings. This motion was made with respect to defendants Virgil Rasmussen, Leroy Giannini and Micky George. In the case of both Rasmussen and Giannini, the motion was denied, but in the case of George, it was granted.

Therefore, Campagne has been disqualified in any case involving Micky George. Mr. Campagne is appealing this ruling. Attorney fees generated by Baker, Manock & Jensen in this effort are currently $86,720.24. Mr. Manock explained that the case required extensive investigation and briefings and that the judge had issued a lengthy opinion when making his ruling. Mr. Manock further noted that the effort had proven successful with respect to Mr. George and it has been reported by Mr. Campagne that it would cost the plaintiffs over $1 million to replace the work performed by his law firm.

Mr. Manock noted that at one point, Mr. Campagne tried to disqualify Baker, Manock & Jensen from the case because he claimed the firm had represented the USDA. The motion was determined to be unfounded and the court sanctioned Mr. Campagne $3,517.50. Mr. Manock noted that this amount will be applied as a credit toward the fees owed by defendants.

When asked about the status of the anti-trust case, Mr. Bensing explained that if the 1980 maturity regulation is lawful, as the Ninth Circuit has now ruled, the only issue remaining in the anti-trust case concerns any losses the

plaintiffs might claim as a result of specific variances in the standards set by the defendants. It is believed that there are very few damages to be collected by the plaintiffs should a claim in this area be pursued. Mr. Bensing further noted that there are only two instances where it could possibly be shown there could have been improper decisions made. Mr. Bensing stated that given the Ninth Circuit ruling, it was possible the court would dismiss the case. However, future litigation could not be ruled out entirely.

Mr. Field asked if Mr. George's insurance company would pay for one-third of the fees generated in the disqualification effort. When Mr. Manock asked if CTFA had paid the insurance and was told yes, he said the matter would certainly be investigated.

Mr. Field then asked that since CTFA had prevailed in the disqualification of Mr. Campagne's firm with respect to Mr. George, is it possible to seek damages from Mr. Campagne to cover legal fees. Mr. Manock responded that to the extent that damages are realized, yes it was possible. He felt that Mr. George could bring that action when the Ninth Circuit ruling is finalized.

Mr. Peterson asked if the disqualification of Mr. Campagne included other attorneys of his firm? Mr. Manock replied that it does involve any attorney in the firm or any that have worked for the firm during the period in question. Mr. Manock noted that would include Mr. Brian Leighton and Mr. James Moody who assisted Campagne in the ISA proceedings.

At 12:10 p.m. the Control Committee convened in the executive session. All defendants involved in the current litigation left the room including: Jon Field, Al Peterson, Gary Van Sickle, Micky George and Pat Pinkham. Other committee members who had left the meeting previously

and would not be voting on motions during executive decision were Leo Balakian and Carl Buxman.

At 12:25 p.m. the public meeting was reconvened. Control Committee Vice Chairman Herb Kaprelian announced that during executive session a motion was made, seconded and unanimously approved as follows: *With respect to the Sherman Anti-Trust immunity issue, the Committee recommends that the billing submitted by Baker, Manock & Jensen (maximum amount of $70,000) be resubmitted to the Justice Department for payment. If the Justice Department refuses payment, the Committee recommends that USDA approve payment of this billing using assessment dollars to be divided equally among the Peach Commodity Committee, the Nectarine Administrative Committee and the Plum Commodity Committee.*

Mr. Kaprelian further stated that a second motion was made, seconded and unanimously approved as follows: *With respect to the disqualification issue, the Committee recommends that the billing submitted by Baker, Manock & Jensen (maximum amount of $90,000) be resubmitted to the Justice Department for payment. If the Justice Department refuses payment, the Committee recommends that USDA approve payment of this billing using assessment dollars to be divided equally among the Peach Commodity Committee, the Nectarine Administrative Committee and the Plum Commodity Committee.*

Other Business

Mrs. Vawter announced that assessments which the Department has been unable to collect will now be submitted to a credit collector and any IRS income tax refunds due the parties in question will be held in lieu of payment and credit reporting services will be notified of the outstanding debt. Ms. Vawter asked that this be made public in the CTFA newsletter.

There being no further business, the meeting was adjourned at 12:30 p.m.

Respectfully Submitted,

/s/ JONATHAN W. FIELD

JONATHAN W. FIELD
Manager

JWF/mfw
Attachment

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:

WILEMAN BROS. & ELLIOTT, INC.,
a California Corporation,
Petitioner

and

KASH, INC.,
a California Corporation,
Petitioner.

AMA Docket No. F&V 916-3
(Nectarines)

AMA Docket No. F&V 917-4
(Plums and Peaches)

DECISION AND ORDER

May 24, 1991

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a California Corporation and
Kash, Inc., a California Corporation,
AMA Docket Nos. F&V 916-3, 917-4

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:

WILEMAN BROS. & ELLIOTT, INC.,
a California Corporation,
Petitioner

and

KASH, INC.,
a California Corporation,
Petitioner.
AMA Docket No. F&V 916-3
(Nectarines)

AMA Docket No. F&V 917-4
(Plums and Peaches)

Decision and Order
As to Wileman/Kash II

PRELIMINARY STATEMENT

These proceedings were instituted under 7 U.S.C. section 608C(15)(A), being section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended. It arises by reason of a Petition filed on June 6, 1988, and an Amended Petition filed on July 31, 1989. For purposes of convenience of reference, both the Initial Petition and the Amended Petition will be referred to herein as the "Petition."

The Petition of the parties raises various allegations with respect to the Nectarine, Plum and Peach Marketing Orders found in Title 7 C.F.R. § 916.1 *et seq.*, and 917.1 *et seq.* concerning what is referred to herein, for convenience of reference, as the "1988 Harvest Season" and the "1989 Harvest Season" with respect to Plums and Nectarines and for those years and prior thereto as to Peaches.

The Petitioners have been handlers of both Nectarines and Plums for well over 20 years and growers of both Nectarines and Plums for over 40 years. The Petitioners and their businesses are regulated pursuant to the Agricultural Marketing Agreement Act (7 U.S.C. § 601 *et seq.*) and the Nectarine, Peach and Plum Marketing Orders (Title 7 C.F.R. §§ 916.1 *et seq.* and 917.1 *et seq.*, respectively).

Petitioner Wileman Bros. & Elliott, Inc. farm approximately 3,000 acres of citrus and tree fruits which they pack and market through their own packing house. Petitioner Elliott packs fruit grown on approximately 400 to 500 acres of Nectarines and Plums for outside growers. Petitioner Elliott handles approximately 10 different varieties of Nectarines and 20 different varieties of Plums. There are approximately 249 handlers of Nectarines regulated by the Nectarine Marketing Order and 402 handlers of Plums regulated by the Plum Marketing Order.

Kash, Inc., including family members who are shareholders, and Officers, are farming approximately 1,300 acres of Peaches, Plums and Nectarines. In addition, Petitioner Kash, Inc. packs for approximately 12 outside growers who farm approximately 500 acres of Peaches, Plums and Nectarines.

As such, they are regulated handlers.

DUE PROCESS

The instant proceeding, *In re: Wileman Bros. & Elliott, Inc. and Kash, Inc.* (AMA Docket Nos. F&V 916-3 and 917-4), encompassed oral hearing of nineteen (19) days. The hearing was conducted on October 24 through 27, 1989 and January 29 through February 16, 1990. At the conclusion of the hearing a briefing schedule was established. Petitioners' Post-Hearing Brief was Ordered submitted by April 30, 1990; Respondent's Opposition Brief to be filed on

June 6 1990; and, Petitioners' Reply Brief to be filed by June 30, 1990 (Tr. 4945-4946). The briefing schedule was premised on the transcripts of the hearing being provided to the parties on or before March 9, 1990. (Tr. 4944).

The transcripts of the original hearing, however, were not delivered until March 18, 1990, at which time, Petitioners were involved in briefing Respondent's Appeal of a prior 7 U.S.C. § 608c(15)(A) Petition Decision and Order issued in a related matter involving the same parties (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3). Petitioners' Opposition Brief and Cross-Appeal were to be filed on March 30, 1990. As a result, Petitioners indicated they were unable to commence review of the transcripts of the instant proceeding until April 2, 1990.

The instant hearing encompassed 4,994 pages of transcript and several thousand pages of exhibits. Petitioners, further indicated they were aware that to adequately review the transcript and the exhibits and to then draft their Post-Hearing Brief by April 30, 1990, would require uninterrupted effort. In the interim, however, the U.S. Attorney's Office filed, against these same Petitioners, a motion to modify the Stay order issued by the Honorable Edward Dean Price on July 6, 1989 (CV-F-568 EDP). (The matter of modification of the Stay Order resulted in its continuance). Petitioners, recognizing their inability to comply with the briefing schedule in the instant matter and, at the same time, respond to the U.S. Attorney's Office's Motion, sought to extend the briefing schedule previously established in the instant matter. When Petitioners contacted Administrative Law Judge Dorothea A. Baker, the hearing Judge, requesting an extension in which to file their Post-Hearing Brief to May 31, 1990, I had anticipated, due to the complex nature of the instant matter, the likelihood of a request to modify the briefing schedule. (Tr. 4946). The initial briefing

schedule was also premised upon timely receipt of the hearing transcript.

I found Petitioners' request for an extension reasonable under the circumstances, and advised Petitioners' counsel to file a formal written Motion requesting said extension. The formal Motion was placed in the mail on April 5, 1990.

In the interim, Petitioners filed with the Secretary of Agriculture a Motion to Recuse Judicial Officer Donald A. Campbell from hearing the Appeal in the original 7 U.S.C. § 608c(15)(A) Petition proceeding. Petitioners contended that Judicial Officer Donald A. Campbell was prejudiced and biased against Petitioners and that he was predisposed to overturn the Decision and Order issued by Administrative Law Judge Dorothea A. Baker in the prior proceeding (*In re: Wileman Bros. & Elliott, Inc. and Kash, Inc.*, AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3).

On April 6, 1990, prior to receipt of Petitioners' Motion for Extension of Time, the Judicial Officer for the Department of Agriculture, Donald A. Campbell, denied Petitioners' request that the Judicial Officer be recused from presiding over the Government's appeal. Petitioners stated — "as if to buttress Petitioners' argument that the Judicial Officer was prejudiced and biased," Judicial Officer Campbell ordered consolidated the appeal of the Government in the first 15(A) case, (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3) with the instant matter (AMA Docket Nos. F&V 916-3 and 917-4) which had not then been briefed and at a time when the transcript was still not available to the Administrative Law Judge. His unprecedented Order, wherein he expressed his desire to expedite the instant proceeding, effectively recused and removed me, Administrative Law Judge Dorothea A. Baker, from issuing my Decision and Order in the instant matter and instead replaced the Administrative Law Judge with the Judicial Officer, who would "act as the agency in the place and stead

of the ALJ in issuing the Decision in *Wileman II*." He further ordered that all motions were to be ruled on by the Judicial Officer rather than the Judge who presided over the hearing.

Administrative Law Judge Baker, upon receipt of Petitioners' Motion For An Extension of Time to file its Post-Hearing Brief, no longer having the authority to rule on this Motion, forwarded Petitioners' Motion to the Judicial Officer with the notation, "I was going to grant their [Petitioners] Motion for Extension of Time * * * ."

The Judicial Officer, as the final deciding authority for the Department, declined to grant Petitioners' Motion for an extension to May 31, 1990, instead he ordered Petitioners to file their Post-Hearing Brief on or before May 16, 1990. He also ordered: "*Wileman I* and *Wileman II* are hereby consolidated. The Judicial Officer will act as the agency in the place and stead of the Administrative Law Judge in issuing the decision in *Wileman II*. Unless modified by further order, the Administrative Law Judge shall expeditiously issue a recommended decision in *Wileman II* * * * ." Petitioners, aware that they would be unable to review the extensive record and adequately brief this matter in the time allotted, drafted a letter to Judicial Officer Campbell requesting that he reconsider Petitioners' request. Petitioners pointed out that their request was reasonable under the circumstances and further that they were seeking only an additional two (2) weeks beyond the date designated for the filing of their Post-Hearing Brief. The Judicial Officer refused Petitioners' request.

As the Judicial Officer had previously stated that he would consider modification of Orders issued if Respondent had no objection, Petitioners sought a Stipulation from Respondent to modify the briefing schedule. Petitioners contacted trial counsel, Helen Boutrous, Esquire, staff attorney with the Office of the General Counsel, requesting a

Stipulation that Petitioners might be granted a "professional courtesy" and be allowed until May 31, 1990, to submit their Post-Hearing Brief. Petitioners were advised that Attorney Boutrous would have to "check with her clients," the Agricultural Marketing Service. As Petitioners' counsel had previously allowed Attorney Boutrous extensions of time on other related matters, Petitioners assert that they believed that Attorney Boutrous would understand Petitioners' need for an extension and would so stipulate. However, on May 10, 1990, Attorney Boutrous advised Petitioners that her clients were unwilling to allow any extensions of time.

Petitioners, in their pleading have indicated that they, " * * * have resigned themselves to the fact that they are unable to secure a fair and impartial ruling before the Secretary of Agriculture." Petitioners seek redress from the Secretary of Agriculture; and have pointed out that the Administrative Law Judge assigned to hearing the case is employed by the Secretary of Agriculture; the attorneys representing the Secretary of Agriculture are employed by the Secretary of Agriculture; and when Petitioners prevailed in the earlier case before the Administrative Law Judge, the matter was reviewed by the Judicial Officer who is employed by the Secretary of Agriculture.

Further quoting Petitioners, "Then, when Administrative Law Judge Baker issued a Decision and Order (AMA Docket Nos. F&V 916-1, 916-2, 917-2, 917-3) inconsistent with the Secretary's position, the Judicial Officer, to insure that this does not again occur, orders the same Administrative Law Judge not to write the Decision and Order in the subsequent related matter, but instead is willing to violate the Administrative Procedure Act to guarantee a ruling in favor of the Department of Agriculture." The Judicial Officer indicated, among other things, in his April 6, 1990, "Order Granting Respondent's Motion to Consolidate and Denying Petitioners' Motion to Recuse,

that: " * * * the Judicial Officer may issue the final order in a case, without waiting for the Administrative Law Judge to issue an initial decision." (Page 7). And: " * * * If the Administrative Law Judge has not issued a recommended decision in *Wileman II* by the time my decision in *Wileman I* is to be issued, I will then determine whether it is desirable to modify my present order, and issue my own recommended decision in *Wileman II*, rather than having the Administrative Law Judge issue a recommended decision. My determination at that time would be based on ascertaining from the Administrative Law Judge how long it would take her to issue a recommended decision * * * ."

On July 10, 1990, the Judicial Officer issued a notice and Order that stated, *inter alia*, "After a telephone discussion with Administrative Law Judge Dorothea A. Baker, I have decided to issue the recommended decision in *Wileman II* myself, without any further action by Judge Baker. *Order* — The recommended decision in *Wileman II* will be issued by the Judicial Officer rather than the ALJ." On August 17, 1990, the Department (Respondent) filed a motion to the Judicial Officer to vacate his July 10, 1990 Order, because, *inter alia*, "* * * It would appear that a recommended decision by the Judicial Officer would necessarily be required to be followed by a final decision by the same Judicial Officer, limited to the same adjudicatory record. Thus, it would be an act without substance." A few days later the Judicial Officer granted Respondent's motion and transferred the case back to Judge Baker.

In addition to the period after April 6, 1990, when the Administrative Law Judge was removed from the case, ordered not to issue rulings, and the like, (which would include requests for additional briefing time, requests for additional information from the attorneys, etc.), there was an earlier period (January 25, 1989 to March 8, 1989), when the case was re-assigned by the Chief Administrative

Law Judge to himself, and, Administrative Law Judge Baker was no longer the Judge assigned to the case. In other words the jurisdiction of Judge Baker as such has not existed from April 6, 1990, to the end of August, 1990, and did not exist for a period from January 25, 1989, when the Chief Administrative Law Judge issued a "Reassignment of Proceedings" stating among other things: "To assure that the instant proceeding will be resolved expeditiously, it is hereby reassigned to Chief Judge Victor W. Palmer. An oral hearing shall be held on March 21, 1989, in San Francisco, California." The "Reassignment of Proceedings" apparently followed a letter from Respondent's counsel dated January 25, 1989 and hand delivered to the Chief Administrative Law Judge. Within hours after receiving this request from Respondent's counsel, the Chief Administrative Law Judge agreed with the Respondent's counsel and issued the "Reassignment of Proceedings." This is more fully set forth in letters dated January 25, 1989, and, February 23, 1989, from Respondent's counsel to Chief Administrative Law Judge Palmer; February 20, 1989, from Petitioners' counsel to Chief Administrative Law Judge Palmer; and February 6, 1989, and stamped in by the Hearing Clerk on February 14, 1989, in which Petitioners' counsel indicated among other things that the Chief Administrative Law Judge was being requested to reconsider because he had issued an order based on Respondent's letter *before* Petitioners had seen it and had an opportunity to respond; that it was inappropriate for Government counsel to try to change an agreement as to trial procedures which had been reached among counsel and Judge Baker; that there would be considerable savings of resources if the trial in *Wileman II* occurred after the issuance of the Administrative Law Judge's decision with respect to *Wileman I*. By January 3, 1989, Judge Baker had been enjoined from holding any hearings, which included that of *Wileman/Kash II*.

As the result of the Chief Administrative Law Judge enjoining Judge Baker from proceeding with her cases as had been assigned to her, it became necessary to advise various counsel, including counsel for these Petitioners, and counsel for the Respondent herein, that Judge Baker had been so enjoined and, accordingly, was precluded from holding hearings including the hearing on this particular case (*Wileman/Kash II*). Included among the correspondence which ensued between Government counsel and the Chief Administrative Law Judge is the letter dated February 23, 1989, in which it is stated among other things:

> * * * Respondent submits that noticing a Decision by Judge Baker in the earlier case would be of absolutely no utility. In the first place, since both parties have already stated that they would appeal an unfavorable decision, Judge Baker's decision will not be a Final decision of the Secretary and, thus, will have no precedential value. Indeed, petitioners even assert that they want both decisions (Judge Baker's and the subject proceeding) consolidated for appeal before the Judicial Officer. In addition, Judge Baker's decision will not be "evidence" but rather just her findings and conclusions based solely on the evidence (the transcripts and exhibits) in the earlier proceeding.

In addition, said letter asserted to the Chief Administrative Law Judge that with respect to the color chip test assignments: "* * * It is undisputed that for many years before 1988 such actions were undertaken as informal application of a general maturity standard and *were not subject to rulemaking*. Thus, at the prior hearing, much testimony dealt with the basis for particular applications over the years * * *." (Emphasis added). Referring to the notice and comment procedure which occurred in 1988, it is stated by Respondent: "Since the basis for all of these requirements is now the rulemaking record, *rather than just some informal*

interpretations, it is clear there has been a substantial change of circumstances." (Emphasis added). In addition, the Respondent's counsel, to the Chief Administrative Law Judge, strongly urged that the *Reassignment to the Chief Administrative Law Judge be maintained.* Apparently, there were conference telephone calls involving the Chief Administrative Law Judge and/or counsel for either or both the Respondent and the Petitioners to which this Judge was not a party. In any event, on May 18, 1989, nine and a half months from referral to Judge Baker by the Hearing Clerk for decision (the last brief was Filed July 21, 1988 and referred to her on August 4, 1988) I issued my Decision in *Wileman/Kash I*, AMA-F&V 916-2, 917-2, 916-1, 917-3, assigned to me on June 10, 1987, and September 25, 1987. The above facts differ from the Chief Administrative Law Judge's assertion in *Gerawan Co., Inc.*, AMA Docket Nos. F&V 916-4, and 917-5 (July 6, 1990) that there was a "* * * a 1-year delay between the completion of briefing and the issuance of a decision by Judge Baker."

The instant proceeding is being issued approximately nine months from its referral back to the Administrative Law Judge from the Judicial Officer.

These Petitioners have followed every known avenue to have their Petition for redress administratively determined. They have indicated that they, "are confident that they will ultimately prevail through the 7 U.S.C. § 608c(15)(B) process. Petitioners are equally convinced that the 'exhaustion' requirement is a travesty of justice. The 'administrative process' does not even attempt to create a facade of fairness, but rather a 'kangaroo' court has been established to guarantee that the Secretary of Agriculture prevails. It is clear that the Judicial Officer will manipulate, distort and ignore the relevant evidence to mold a decision consistent with Department policy." The aforesaid recited views of Petitioners are set forth because this case is subject to scrutiny for due

process, which cannot be overridden by administrative convenience, and should not be overridden by administrative power accomplished through subtle and indirect ways. Due process requires that when Governmental agencies adjudicate or make binding determinations which directly affect fundamental and legal rights of individual and/or entities, such agencies must employ procedures which are traditionally associated with judicial process. It takes on added importance because, for the most part, the Courts have adhered to the doctrine of exhaustion of administrative remedies.

The Petition filed herein seeks, alternatively, to: (1) Modify various provisions of Orders Nos. 916 and 917; (2) Terminate various provisions of said Orders; and/or (3) Exempt Petitioners from various provisions of said Orders and any obligations imposed in connection therewith that are not in accordance with law.

The issues raised are numerous and are enumerated hereinafter to enable a reviewing Federal Court to be apprised thereof. Briefly stated, but not inclusive, the Petitioners contend that the Department of Agriculture has violated their Constitutional rights by denying them due process; taking their property without due process and without just compensation; and by denying to Petitioners First Amendment rights. In addition, it is claimed that certain provisions of Market Orders 916 and 917 are invalid; that actions (or inactions) taken pursuant thereto, are illegal, that adherence to the Administrative Procedure Act has not been done; that certain acts undertaken, allegedly pursuant to the provisions of the Marketing Orders are improper without proper formulation, and are either *ultra vires*, without proper delegation, or that there is an absence of delegation to the extent that obligations imposed therewith, as written and/or as applied, are not in accordance with law.

This case follows the earlier case by these Petitioners, AMA Docket Nos. F&V 916-1, 917-3, 916-2, 917-2, wherein a 401 page Initial Decision by this Administrative Law Judge was filed on May 19, 1989, finding for Petitioners on many issues concerning Nectarines and Plums and involving years prior to the 1988, 1989 Harvest Seasons. On appeal the Judicial Officer reversed that Initial Decision in his 129 Page Decision, issued on behalf of the Secretary, on July 9, 1990. The Judicial Officer maintained, among other things, that a scrutiny of the promulgation record of 1980-81 precluded judicial inquiry or consideration of many of the issues raised in the earlier Petition.

No attempt will be made to summarize the Judicial Officer's entire decision, but a brief synopsis indicates various significant pronouncements by the Judicial Officer. In view of the extensive stipulation in *Wileman/Kash II*, the *material in brackets and the underlined portions represent the Administrative Law Judge's comments as they might relate to a better* understanding of *Wileman/Kash II*.

The Judicial Officer's decision in *Wileman/Kash I* indicates the Department's views that: "The only distinction between the situation under these Marketing Orders and the other grading and inspection activities of the Department is that the Committees and their Maturity Subcommittees may make exceptions and changes in test levels." (P. 53-slip op.). [This "distinction" translates into power to determine whose fruit, and how much may be shipped. Reliance for the Subcommittees' power was said to be premised upon "intent" which the Judicial Officer said was subsequently reflected in the Bylaws of the Committees in 1982 and 1983 to express this intent. *However, there is no indication of delegation, specific or otherwise, directly from the Secretary.*] Finding 36 thereof by the Judicial Officer also indicates that, "Only Shipping Point Inspectors are permitted to

determine whether fruit is U.S. No. 1 or meets the assigned color chip or other maturity test." (P. 56).

The Judicial Officer's finding No. 41 indicates the term " 'California Tree Fruit Agreement' (CTFA) is a term that has different meanings, depending *on the context in which it is used. The term is variously used by different people, or even the same people at different times, to refer to any or all of the various groups of people* associated with Marketing Orders 916 and 917, or to Marketing Order 917 by itself. To growers, handlers, and others associated with the industry, 'CTFA requirements' may mean, at times, explicit U.S.D.A. regulations under Order 916 or Order 917, or specific maturity tests either as determined by the Inspection Service or as determined by changes and variances made by the administrative committees. Inspection service personnel use the term to refer to any Committee members or staff personnel or to requirements under the two Marketing Orders, as distinct from Inspection Service personnel and the requirements in the U.S. Standards. The Committees' members and the hired staff personnel tend to use the term 'CTFA' to mean the hired staff employees, and use 'the CTFA requirements' to mean any Marketing Order requirements, *although such usage is not consistent.*" The Judicial Officer then goes on to acknowledge that the term California Tree Fruit Agreement is nowhere defined in Marketing Orders 916 and 917 and is used just once in the regulations for Order 917, where there is a reference to sending reports, requests, etc. to the "Control Committee, California Tree Fruit Agreement." (7 C.F.R. § 917.110). [This finding by the Judicial Officer reinforces the Petitioners's position that the objectives of the Administrative Procedure Act defy ascertainment — namely, that interested persons be able to ascertain who makes the decisions which affect them, and, in what capacity. When no one knows what the term CTFA means, it is difficult to charge the public and other interested persons with such knowledge. How can it be

ascertained when its use is consistent and when it is not? In addition, this Finding of the Judicial Officer affirms that there are *various standards*, i.e. (1) *"explicit" regulation*; (2) *specific maturity tests determined by the Inspection service*; and (3) *maturity tests determined by the administrative Committees pursuant to their power to grant chances and variances.*]

Among other statements made by the Judicial Officer in Wileman/Kash I are the following: "First, the ALJ and the Judicial Officer can only rule on matters raised in the petitions filed by petitioners; second, they cannot rule on discretionary determinations as to a particular lot of fruit; and third, the Act does not permit an award of monetary damages." (P. 65). With respect to whether or not a particular shipment meets the required criteria, the Judicial Officer noted: "If the appropriate procedure has been followed *and the Marketing Order and regulations are valid*, the obligation not to ship the lot has been imposed 'in accordance with the law' *irrespective of whether an error of judgment was, in fact, made* in determining the suitability for shipment of a particular lot." (Emphasis added). "• • • By the same reasoning, if the procedure for variances from the maturity requirement is valid, whether a variance should or should not have been given in a particular case is not reviewable in a § 8c(15)(A) proceeding." [Without belaboring this point, as it is not necessary to this decision, it relates to the question of availability of effective and timely relief. What if the refusal to let a handler ship is premised on something more than "error of judgment," such as malice, gross negligence or incompetency, or monetary gain?]

Further, in his opinion, the Judicial Officer stated: "There is no authorization in the Act, the Marketing Orders, or the Rules of Practice for consequential damages (as distinguished from a return of monies paid) to be awarded in § 8c(15)(A) proceedings. In over 50 years of proceedings

under this Act, consequential damages have never been awarded. Petitioners and the ALJ attempt to distinguish fruit and vegetable orders from milk orders. • • • This allegation is incorrect." The Judicial Officer then indicated cases where refunds had been made to milk handlers and he further stated that: "Furthermore, even though an obligation unlawfully imposed on a milk handler might permit a return of the money unlawfully exacted from the handler, the general practice in this Department is first to give the Secretary the opportunity in his rulemaking capacity, to correct the error, retroactively." In this regard, the Judicial Officer made reference, to a number of milk cases including *In re: Defiance Milk Products Co.*, 44 Agric. Dec. 11, (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd* 857 F.2d 1065 (6th Cir. 1988). The Judicial Officer noted, among other things, that: "In *Defiance*, the Judicial Officer recognized that some courts had awarded monetary relief to some handlers, *but the Judicial Officer did not adopt that policy as the proper Departmental policy*." Further setting forth the Judicial Officer's authority to make determination of Departmental policy he made reference to the case *In re: Borden, Inc.*, 37 Agric. Dec. 987, 997-1000 (1978), remanded 38 Agric. Dec. 1061 (1979), dismissed per settlement agreement 40 Agric. Dec. 1711 (1979), and, in connection therewith the Judicial Officer noted: " • • • the Judicial Officer remanded the proceeding to the ALJ to determine the damages [i.e., the return of money paid by the handler]. But that remand order does not reflect the Department's customary practice, since the remand order related to two related proceedings, one of which was controlled by a court decision holding that *Borden* was entitled to recover the overpayments from the producer-settlement fund • • • ."

It basically is the position of the Judicial Officer that if the Secretary's rulemaking actions are found to be unlawful, the proper course is to remand the matter to the Secretary

for lawful action and that irrespective of whether the Secretary should be permitted to correct an error retroactively, where error has been found in a section 8c(15)(A) proceeding, an award of monetary damages (is distinguished from a return of money already paid, is not permitted by the Act). (P. 75). [Until the filing of the Petitions in *Wileman/Kash I* there have been scant section (15)(A) Fruit and Vegetable Petitions before the Secretary — and none involving all the issues and facts present herein. Therefore, *Wileman/Kash I* and *Wileman/Kash II* are cases of first impression as to whether there is preclusion of remedy no matter how grievous the wrong. The Federal Courts have made no such determinations and have it within their judicial powers to fashion a remedy where one is due. Since the filing of the Petition in *Wileman/Kash I*, there have been a number of cases decided by the Judicial Officer relating to Marketing Orders: *In re: Cal-Almond, Inc., et al.*, 50 Agric. Dec. ____, slip op. (March 8, 1991); *In re: Sequoia Orange Co., Inc.*, AMS Docket Nos. F&V 907-12, 907-15, 907-16, 910-8 (March 29, 1991); *In re: Saulsbury Orchards and Almond Processing, Inc., et al.*, AMA Docket No. F&V 981-4 (January 23, 1991). It is believed these cases have been or will be appealed.

The matter of assessments and the California Tree Fruit Agreement, as set forth in *Wileman I*, was determined by the Judicial Officer as: "Accordingly, the issue is not properly in this case * * * ."

Among other determinations made by the Judicial Officer in the aforesaid decision on behalf of the Department are those of: (1) in addition [*Wileman I*] neither Petition questioned the constitutionality of requiring Petitioners to pay for advertising and, therefore, the constitutionality of requiring Petitioners to pay for advertising was not properly raised in this proceeding [*Wileman I*].

With respect to the validity of the Committees' expenses, the Judicial Officer noted: " * * * I am in complete agreement with the ALJ's holding [which was based upon the evidence adduced in the *Wileman I* proceeding] holding that notice and comment rulemaking is not required for the Secretary's approval of any of the Committees' expenses, including advertising expenses." The Judicial Officer likened the Secretary's authority to: "The Secretary's right to approve the budgets of the Committees without notice and comment rulemaking is the same as his right to approve, without notice and comment rulemaking, the budget of his other agencies, such as the Office of the Administrative Law Judge, the Office of the General Counsel, the Agricultural Marketing Service, its Fruit and Vegetable Division, or its Marketing Order Administration Branch." [Based upon the more extensive evidence and pleadings, in *Wileman II*, I am now of the opinion that the aforesaid conclusion by me, and affirmed by the Judicial Officer, in *Wileman I*, was in error. The vast amount of documentary evidence and testimony in *Wileman II* shows the applicability of the Administrative Procedure Act and the necessity of notice and comment to the budgetary approval process in order to be in compliance with the Administrative Procedure Act.]

With respect to advertising, in *Wileman I*, the Judicial Officer stated: "Petitioners are essentially arguing the desirability of spending Order money for advertising. But the Marketing Orders in question (7 C.F.R. §§ 916.45, 917.39) expressly authorize spending assessment monies for advertising. Since Petitioners have not challenged the formal rulemaking records that determine the desirability of those Order provisions, they are barred from litigating the question of whether these particular Marketing Orders should contain such provisions. " * * * Petitioners' argument regarding the desirability of advertising is not justiciable herein."

Although indicating that the advertising issue was not justiciable before the Department in *Wileman I*, the Judicial Officer by way of dicta, stated: "No Secretarial approval of budget items requires notice and comment rulemaking." The Judicial Officer indicated that approval of the budget items is not subject to the Administrative Procedure Act and that when the Secretary publishes the actual assessment rate as a final rule, he invokes the "good cause" exception to the Administrative Procedure Act (5 U.S.C. § 553(b)) for not engaging in notice and comment procedures. "This is entirely appropriate since the law requires that the assessment conform with a ministerial calculation." In arriving at this conclusion the Judicial Officer recognized: "At the time of the publication of the final rule setting forth the assessment rate, all discretionary budget determination have previously been made, and the budgetary-approval process is not subject to the Administrative Procedure Act." [This is precisely what the Petitioners are raising in their Petitions namely, in *Wileman II*, that the bureaucratic process is made up of a maze where there are various discretionary determinations made, into which they and other handlers have no meaningful input.] There is no place and no time where they can question the amounts and purposes of the budget items. The "public meetings" referred to are meaningless.

With respect to the Petitioners' contention as to the proper time period for submitting comments with respect to the informal rulemaking as well as formal rulemaking matters in the *Wileman I* proceeding, the Judicial Officer quoted his decision in *In re: Farm Fresh, Inc.*, 49 Agric. Dec.-slip op. at 45 (April 12, 1990), *appealed docketed*, Civ-90-688T (W.D. Okla. May 1, 1990) in which the Judicial Officer indicated that the Administrative Procedure Act required only three-days notice before an amendment hearing and that: "The Rules of Practice under the statute also provide for 3-days' notice for an amendment hearing

(7 C.F.R. § 900.4(a)). Short notice periods for amendment hearing have long been upheld * * * ."

Among other holdings by the Judicial Officer were: (1) the Secretary's maturity regulations are valid and were properly interpreted and applied; (2) the Secretary's regulations, as amended in 1980, established a higher maturity level (a.k.a. "well-matured"); (3) there is no difference between the "higher" maturity standard and the "well-matured" standard; (4) changes in color chip designation for a particular variety did not change the law and were not subject to the rulemaking requirements of the Administrative Procedure Act; and (5) the higher maturity standard (a.k.a "well-matured") is not too vague.

The Judicial Officer indicated: "Although it would have been better practice to have published the variance procedure in the Federal Register in 1980, I do not regard the failure to do so as a fatal error, in the circumstances here." (P. 108).

In summarization, the Judicial Officer's decision has as an underlining premise a rationale that whether the Secretary acted or not, "Under the Orders (7 C.F.R. §§ 916.62, 917.30), the Secretary has the unilateral power to disprove and void any regulation, decision or determination of the Committees." (P. 112). The Judicial Officer further concluded notwithstanding the evidence of record, that the Department did exercise its oversight authority during the time period involved in *Wileman I*.

To what degree mistakes of judgment and failure to act are tolerated is not known nor is the line delineated where they become illegal. However, in arriving at his conclusion that the maturity requirements were not arbitrary and capricious, the Judicial Officer stated: "Although some mistakes of judgment were made in isolated instances over the years in failing to grant variances, or failing to grant them

promptly enough, such lack of perfection does not invalidate the maturity program." (P. 123). "The Minutes of the Nectarine and Plum Committees over the years show recognition of the fact that the maturity program has not worked perfectly in every instance in every year, but that the plum and nectarine growers and handlers are much better off with the program than under the lesser maturity standard in effect prior to 1980. [Footnote omitted]. The program is not arbitrary and capricious, notwithstanding the lack of 100 percent perfection."

The Judicial Officer further concluded that the Federal Advisory Committee Act is not applicable to the Committees administering the Market Order programs. In arriving at that conclusion he first determined that no issue was raised in the Petition with respect to the Federal Advisory Committee Act and therefore could not be considered in *Wileman I* but then goes on to state that even if the issue could be raised, the Federal Advisory Committee Act applies to Advisory Committees, not to Committees with operational responsibilities.

The above highlights of the Judicial Officer's decision in *Wileman I* are recognized by the Administrative Law Judge as a guiding light; however, because his decision in that case, as well as other cases presently pending before the Department, are or will be on appeal to the Federal Courts, and also because *Wileman II must be decided on the record made herein*, to the extent that it is helpful to the Judicial Officer, certain matters, with which he may not agree, are nevertheless set forth in this *Wileman II* decision. Hopefully this will be of assistance to him in his review thereof as well as to a Federal Court. Reference to *Wileman/Kash I*, and *Wileman/Kash II* have been underlined for ease of recognition.

The Respondent herein maintains that the doctrine of issue preclusion and/or *res judicata* is applicable to

Wileman/Kash II. This Judge has found that although the parties are the same, the issues and evidence are different. *Wileman/Kash I* did not litigate the validity of the Order provisions applicable to Peaches; the circumstances of *Wileman/Kash I* are different from those of *Wileman/Kash II* in that in 1988, *for the first time*, since 1981, the Secretary published regulations which have relevance to the 1988-89 and subsequent Harvest Seasons; new and different evidence was presented in *Wileman/Kash II*, particularly with respect to the role played by an entity called the Tree Fruit Reserve, as well as numerous, new evidentiary matters. In addition, the Judicial Officer declined to rule on a number of issues as being beyond the scope of *Wileman/Kash I*. Accordingly, his statements as to issues not ruled upon must be considered *dicta*.

The oral hearing in the instant case commenced on October 24-28, 1989, and continued January 29 through February 16, 1990, in Fresno, California, before Administrative Law Judge Dorothea A. Baker. The Petitioners were represented by Thomas E. Campagne, Esquire, and Clifford Kemper, Esquire, of the Law Firm of Thomas E. Campagne, 5108 E. Clinton Way, Suite 122, Fresno, California 93727; also appearing as counsel for Petitioners was James Moody, Esquire, 2300 N St., N.W., Suite 600, Washington, D.C. 20037; the Department of Agriculture was represented by Gregory Cooper, Esquire, and Helen Boutrous, Esquire, of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250. The Department of Justice was represented by William Hahesy, Esquire, and Carl Blackstone, Esquire, Assistant U.S. Attorneys. Lawrence A. Wengel, Esquire, of Greve, Clifford, Diepenbroch & Paras, 1000 G St., Suite 400, Sacramento, California 95814-0885 appeared as counsel on behalf of the accounting firm, Bennett Associates. The Tree Fruit Reserve Corporation was represented by Michael P. LeLouis, Esquire, of Heron, Burchette,

Ruckert & Rothwell, One City Centre, 770 L St., Suite 1150, Sacramento, California 95814.

At the oral hearing, testimony was heard from 21 witnesses, there were several thousand pages of Exhibits (Exh. 1-400) and the hearing transcript encompasses 4,994 pages.

The various motions, requests, and other pleadings are extensive. Unless otherwise required, they shall not be enumerated herein. However, they should not be overlooked by a reviewing Federal Court. There is a preeminent issue existing in this case as to the lack of an effective, timely relief mechanism when a handler believes itself aggrieved by Order provisions. Congress has clearly indicated, and the courts have agreed, that the Agricultural Marketing Agreement Act provides and compels the filing of a Petition with the Secretary of Agriculture whenever a handler seeks exemption or modification of Order obligations. The handler has no choice but to exhaust his administrative remedies. This undoubtedly is premised on the assumption that the administrative agency can and will grant relief when warranted. The question raised in this proceeding is the concern which arises, when the remedy provided is neither timely nor effective. To add to the importance of this matter is the fact that the monetary obligations arise by reason of application of assessments to a limited number of people for a particular purpose and are not amounts derived from Congressionally appropriated funds. However, were they considered the latter they would be in the nature of a tax, and would be illegal since neither the Committees nor the Secretary has been delegated taxing authority.

Achievement of simplicity is attempted with the purpose of rendering an Initial Decision as expeditiously as circumstances permit.

Before proceeding to the Findings of Fact, there is an area requiring clarification: the only thing to be adjudicated

herein relates to relief sought by reason of Federal Marketing Orders, F&V 916 and 917. It is not a promulgation proceeding; no new rules and regulations will be forthcoming from this Administrative Procedure Act litigation case. There is no challenge to the regulatory scheme of the Orders. Except for the argument as to delegation and lack of record supportive evidence, it is not maintained that they are illegal. What must be decided herein is whether Petitioners should be relieved of obligations imposed by Marketing Orders 916 and 917 because the imposition of such obligations *was not in accordance with law.* This requires consideration of Constitutional rights, the Administrative Procedure Act, the Agricultural Marketing Agreement Act and any other laws entering into a determination of the legality of the operations of the Committees and the interpreting application, and *de facto* administering of the Order provisions. Above all, it is *not* a proceeding to ascertain and evaluate the functions of the California Tree Fruit Agreement, the Tree Fruit Reserve, the Federal-State Inspection Service, or any other person or entity except to the extent their operations and actions reflect, influence, or otherwise enter into the Secretary of Agriculture's statutory duties and his delegations thereunder. The issues raised by Petitioners are not in the nature of "attacking" any entity, but rather have as their objective, and ascertainment, the legality of the Department of Agriculture's actions (or non-actions), pursuant to the provision of the Agricultural Marketing Agreement Act which provides:

> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of

Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

Great deference has been accorded the July 9, 1990, Judicial Officer's Department's Decision in *Wileman/Kash I*. In that Decision he stated, *inter alia* that although he had "taken" some of the Administrative Law Judge's findings, with editing and rearranging, "Many other findings by the ALJ were omitted, frequently because I regarded them as irrelevant or based on improper legal conclusions." (fn. 4). Because of the ambiguity and vagueness for rejection of certain facts in *Wileman/Kash I*, and because the determination of "relevancy" can be a substantive matter, I have set forth herein, as to the present case, those facts which I believe to be relevant to the many issues presented. This is done to be of assistance to a reviewing Federal Court so that if there is a facade of technical compliance that overshadows the actual manner in which the handlers' businesses were regulated, the Court can ascertain same.

The documentation consists, among other things, of the Respondent's submissions, including its 140 page Post-Hearing Brief; and:

(1) The brief originally submitted at the commencement of the instant matter, as Petitioners' Post-Hearing Brief, with specific transcript citations referenced in Petitioners' Reply Brief to Respondent's Opposition Brief;

(2) Appendix to Petitioners' Post-Hearing Brief;

(3) Petitioners' Proposed Findings of Fact;

(4) The 4,994 pages of transcript from the instant proceeding (AMA Docket Nos. F&V 916-3 and 917-4);

(5) All exhibits admitted into evidence in the instant proceeding (AMA Docket Nos. F&V 916-3 and 917-4);

(6) The 3,459 pages of transcript from the prior 7 U.S.C. § 608c(15)(A) Petition hearing (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3) which have been consolidated, by the Judicial Officer. (AMA Docket Nos. F&V 916-3 and 917-4); and

(7) All exhibits admitted into evidence in the previous 7 U.S.C. § 608c(15)(A) Petition hearing (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3) flowing from the Judicial Officer's consolidation of the two cases.

APPLICABLE STATUTES AND REGULATIONS

The principal statutes and regulations are referred to in the text herein. However, for a more complete understanding of the regulatory programs and their relationship to pertinent statutes, the following provisions are set forth in some detail. (With Emphasis added). However, this decision is written on the assumption that the reader is familiar with the particular Marketing Orders programs here involved. Greater specificity thereto was set forth in *Wileman/Kash I.*

THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AS AMENDED, AND SUPPLEMENTED:

§ 602. Declaration of policy; establishment of price basing period: marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress —

* * * * *

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title [which includes fruits], such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will *effectuate such orderly marketing of such agricultural commodities as will be in the public interest.*

* * * * *

§ 608. Powers of Secretary

Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

* * * * *

he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such facts, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of this chapter.

Agreements for adjustment of acreage or production and for rental or benefit payments

(2) Subject to the provisions of subsection (1) of this section, the Secretary of Agriculture shall provide, through agreements with producers or by other voluntary methods,

(a) For such adjustment in the acreage or in the production for market, or both, of any basic agricultural commodity, as he finds, upon the basis of the investigation made pursuant to subsection (1) of this section, will tend to effectuate the declared policy of this chapter, and to make such adjustment program practicable to operate and administer, and

(b) For rental or benefit payments in connection with such agreements of methods in such amounts as he finds, upon the basis of such investigation, to be fair and reasonable and best calculated to effectuate the declared policy of this chapter, and to make such program practicable to operate and administer, to be paid out of any moneys available for such payments or, subject to the consent of the producer, to be made in quantities of one or more basic agricultural commodities acquired by the Secretary pursuant to this chapter.

Payments by Secretary

(3) Subject to the provisions of subsection (1) of this section, the Secretary of Agriculture shall make payments, out of any moneys available for such payments, in such amounts as he finds, upon the basis of the investigation made pursuant to subsection (1) of this section, to be fair and reasonable and best calculated to effectuate the declared policy of this chapter:

(a) To remove from the normal channels of trade and commerce quantities of any basic agricultural commodity or product thereof,

(b) To expand domestic or foreign markets for any basic agricultural commodity or product thereof;

(c) In connection with the production of that part of any basic agricultural commodity which is required for domestic consumption.

Additional investigation; suspension of exercise of powers

(4) Whenever, during a period during which any of the powers conferred in subsection (2) or (3) of this section is being exercised, the Secretary of Agriculture has reason to believe that, with respect to any basic agricultural commodity:

(a) The current average farm price for such commodity is not less than the fair exchange value thereof, and the average farm price for such commodity is not likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, or

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that none of the powers conferred in subsections (2) and (3) of this section, and no combination of such powers, would, if exercised, tend to effectuate the declared policy of this chapter,

he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such facts, he shall proclaim such determination, and shall not exercise any of such powers with respect to such commodity after the end of the marketing year current at the time when such proclamation is made and prior to a new proclamation under subsection (1) of this section, except insofar as the exercise of such power is necessary to carry out obligations of the Secretary assumed, prior to the date of such proclamation made pursuant to this subsection, in connection with the exercise of any of the powers conferred upon him under subsections (2) or (3) of this section.

Hearings; notice

(5) In the course of any investigation required to be made under subsection (1) or (4) of this section, the Secretary of Agriculture shall hold one or more hearings, and give due notice and opportunity for interested parties to be heard.

Commodity in which payment made

(6) No payment under this chapter made in an agricultural commodity acquired by the Secretary in pursuance of this chapter shall be made in a commodity other than that in respect of which the payment is being made. For the purposes of this subsection, hogs and field corn may be considered as one commodity.

* * * * *

Section 608c of the Act contains *inter alia* the following provisions:

§ 608c. *Orders regulating handling of commodity*

(1) *Issuance by Secretary*

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) *Commodities to which applicable; single commodities and separate agricultural commodities*

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, *fruits* . . . .

(3) *Notice and hearing*

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section [which includes fruits], he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) *Finding and issuance of order*

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the *issuance* of such order and *all of the terms and conditions thereof* will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * * * *

(6) *Other commodities; terms and conditions of orders*

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section [including fruits] *orders* issued pursuant to this section *shall contain one or more of the following terms and conditions, and* (except as provided in subsection (7) of this section), *no others*:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or *handled during any specified period or periods shall be apportioned equitably among producers.*

(C) Allotting, or *providing methods for allotting, the amount of such commodity* or product, or any grade, size, or quality thereof, *which each handler may market in* or transport to *any or all markets* in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, *under a uniform rule based upon the amounts which each such handler has available for current shipment*, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, *to the end that the total quantity of such commodity* or product, or any grade, size, or quality thereof, *to be marketed in* or transported to *any or all markets* in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or

foreign commerce in such commodity or product thereof, *during any specified period or periods equitably apportioned among all of the handlers thereof.*

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

* * * * *

(7) *Terms common to all orders*

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * *

(C) *Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:*

(i) *To administer such order in accordance with its terms and provisions;*

(ii) *To make rules and regulations to effectuate the terms and provisions of such order;*

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

(D) *Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.*

* * * * *

(9) *Orders with or without marketing agreement*

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

* * * * *

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be

approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

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(11) *Regional application*

(A) *No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.*

(B) Except in the case of milk and its products, *orders issued under this section shall be limited in their application to the smallest regional production arm or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.*

(C) *All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.*

(12) *Approval of cooperative association as approval of producers*

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(14) *Violation of order; penalty*

Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a *pro rata* share of expenses) shall, on conviction, be fined not less than $50 or more than $5000 [changed from $500 to $5000 by P. L. 99-198] for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such*

violations as occurred between the date upon which the defendant's petition was filed with the Secretary and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(15) *Petition by handler for modification of order or exemption; court review of ruling of Secretary*

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) *to take such further proceedings as, in its opinion, the law requires.* The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to

section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) * * * *the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order of such provision thereof.*

(B) *The Secretary shall terminate any* marketing agreement entered into under section 608b of this title, or *order* issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, *whenever he finds that such termination is favored by a majority of the producers* who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then

current marketing period) as may be specified in such marketing agreement or order

(C) * * * the termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) *Provisions applicable to amendments*

The provisions of this section and section 608d of this title applicable to order shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof . . . . The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced the decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

* * * * *

(19) *Producer or processor referendum for approving order*

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percent-

age required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section . . . .

§ 610. *Administration*

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(b) *State and local committees or associations of producers; handlers' share of expenses of authority or agency*

(1) The Secretary of Agriculture is authorized to establish for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. *The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.*

RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS:

(7 C.F.R. § 900.50, *et seq.*)

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the act shall apply with equal force and effect. In addition, unless the context otherwise requires:

(a) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. and Sup. 601);

(b) The term "Department" means the United States Department of Agriculture;

(c) The term "Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his stead;

(d) The terms "administrative law judge" or "judge" means any Administrative Law Judge, appointed pursuant to 5 U.S.C. 3105, and assigned to the proceeding involved;

(e) The term "Administrator" means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in his stead;

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(h) The term "marketing order" means any order or any amendment thereto which may be issued pursuant to section 8c of the act;

(i) The term "handler" means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable;

(j) The term "proceeding" means a proceeding before the Secretary arising under subsection (15)(A) of section 8c of the act;

(k) The term "hearing" means that part of the proceeding which involves the submission of evidence;

(l) The term "Party" includes the Department;

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(o) The term "decision" means the *judge's initial decision* in proceedings subject to 5 U.S.C. 556 and 557, and includes the judge's (1) findings of fact and conclusions with respect to all material issues of fact, law or discretion as well as the reasons or basis thereof, (2) order, and (3) rules on findings, conclusions and orders submitted by the parties;

(p) The term "petition" includes an amended petition.

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition. Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law*, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(b) *Contents of petition.* A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the

names, addresses, and respective positions held by its officers; If an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the order, *or the interpretation or allocation thereof*, which are complained of;

(3) *A full statement of the facts* (avoiding a mere repetition of detailed evidence) *upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner* in which petitioner *claims to be affected by the terms* or *provisions of the order*, or *the interpretation or application thereof*, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

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§ 900.52b Amended pleadings.

At any time before the close of the hearing the answer may be amended, but the hearing shall, at the request of the adverse party, be adjourned or recessed for such reasonable

time as the judge may determine to be necessary to protect the interests of the parties. Amendments subsequent to the first amendment or subsequent to the filing of an answer may be made only with leave of the judge or with the written consent of the adverse party.

§ 900.55 Judges.

(a) *Assignment.* No judge who has any pecuniary interest in the outcome of the proceeding, or who has participated in any investigation preceding the institution of the proceeding, shall serve as judge in such proceeding.

(b) *Conduct.* The judge shall conduct the proceeding in a fair and impartial manner and shall not discuss ex parte the merits of the proceeding with any person who is or who has been connected in any manner with the proceeding in an advocative or investigative capacity.

(c) *Powers of judges.* Subject to review by the Secretary, is provided elsewhere in this subpart, the judge shall have power to:

(1) Rule upon motions and requests;

(2) Adjourn the hearing from time to time, and change the time and place of hearing;

(3) Administer oaths and affirmations and take affidavits;

(4) Issue subpenas, under the facsimile signature of the Secretary, requiring the attendance and testimony of witnesses and the production of books, records, contracts, papers, and other documentary evidence;

(5) Examine witnesses and receive evidence;

(6) Take or order, under the facsimile signature of the Secretary, the taking of depositions;

(7) Admit or exclude evidence;

(8) Hear oral argument on facts or law;

(9) Consolidate hearings upon two or more petitions pertaining to the same order;

(10) Do all acts and take all measures necessary for the maintenance of order at the hearing and the efficient conduct of the proceeding.

(d) *Who may act in absence of judge.* In case of the absence of the judge of his inability to act, the powers and duties to be performed by him under these rules of practice in connection with a proceeding may, without abatement of the proceeding unless otherwise ordered by the Secretary, be assigned to any other judge.

(e) *Disqualification of Judge.* The judge may at any time withdraw as judge in a proceeding if he deems himself to be disqualified. Upon the filing by an interested person in good faith of a timely and sufficient affidavit of personal bias or *disqualification of a judge, the Secretary shall determine the matter as a part of the record and decision in the proceeding, after making such investigation or holding such hearings, or both, as he may deem appropriate in the circumstances.*

§ 900.56 Consolidated hearings.

At the discretion of the judge, hearings upon two or more petitions pertaining to the same order may be consolidated, and the evidence taken at such consolidated hearing may be embodied in a single record.

§ 900.59 Motions and requests.

(a) *General.* (1) All motions and requests shall be filed with the hearing clerk, except that those made during the course of an oral hearing may be filed with the judge or may be stated orally and made a part of the transcript.

(2) The judge is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing

clerk to the Secretary of the record as provided in this subpart. The Secretary shall rule upon all motions and requests filed after that time.

(b) *Certification of motions.* The submission or certification of any motion, request, objection, or other question to the Secretary, as provided in this subpart, shall be in the discretion of the judge.

§ 900.60 Oral hearings before judge.

(a) *Time and place.* The judge shall set a time and place for hearing and shall file with the hearing clerk a notice stating the time and place of hearing. If any change in the time or place of hearing becomes necessary, it shall be made by the judge, who, in such event, shall file with the hearing clerk a notice of the change. Such notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript.

* * * * *

(c) *Order of proceeding.* Except as may be determined otherwise by the judge, the petitioner shall proceed first at the hearing.

(d) *Evidence — (1) In general.* The hearing shall be publicly conducted, and the testimony given at the hearing shall be reported verbatim.

(i) The testimony of witnesses at a hearing shall be upon oath or affirmation and subject to cross-examination.

(ii) Any witness may, in the discretion of the judge, be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(iii) The judge shall exclude, insofar as practicable, evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely.

(2) *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination, or any other ruling of the judge, he shall state briefly the grounds of such objection, whereupon an automatic exception will follow which may be pursued in an appeal pursuant to § 900.65 by the party adversely affected by the judge's ruling.

* * * * *

(5) *Proof and authentication of official records or documents.* An official record or document, when admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same. Such record or document shall in the discretion of the judge, be evidenced by an official publication thereof or by a copy attested by the person having legal custody thereof and accompanied by a certificate that such person has the custody.

(6) *Exhibits.* All written statements, charts, tabulations, or similar data offered in evidence at the hearing shall, after identification by the proponent and upon a satisfactory showing of the admissibility of the contents thereof, be numbered as exhibits and received in evidence and made a part of the record. *Except where the judge finds that the furnishing of copies is impracticable, a copy of each exhibit, in addition to the original, shall be filed with the judge for the use of each other party to the proceeding.* The judge shall advise the parties as to the exact number of copies which will be required to be filed and shall make and have noted on the record the proper distribution of the copies. If the testimony of a witness refers to a statute, or to a report, document, or transcript, the judge, after inquiry relating to the identification of such statute, report, document, or

transcript, shall determine whether the same shall be produced at the hearing and physically be made a part of the evidence as an exhibit, *or whether it shall be incorporated into the evidence by reference.* If relevant and material matter offered in evidence is embraced in a report, document, or transcript containing immaterial or irrelevant matter, such immaterial or irrelevant matter shall be excluded and shall be segregated insofar as practicable, subject to the direction of the judge

(7) *Official notice. Official notice will be taken of such matters as are judicially noticed by the courts of the* United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided, That* the parties shall be given adequate notice, at the hearing or by reference in the judge's report or the tentative order or otherwise, of matters so noticed, and (except where official notice is taken, for the first time in the proceeding, in the final order) shall be given adequate opportunity to show that such facts are erroneously noticed.

(8) *Offer of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence to be offered. If the evidence consists of a brief oral statement or of an exhibit, it shall be inserted into the transcript in toto. In such event, it shall be considered a part of the transcript if the Secretary decides that the judge's ruling in excluding the evidence was erroneous. The judge shall not allow the insertion of such evidence in toto if the taking of such evidence will consume a considerable length of time at the hearing. In the latter event, if on appeal the Secretary decides that the judge erred in excluding the evidence, and that such error was substantial, the hearing shall be reopened to permit the taking of such evidence.

* * * * *

(f) *Transcript.* (1) During the period in which the proceeding has an active status the transcript and exhibits shall be kept on file in the office of the hearing clerk, where it shall be available for examination during official hours of business. Thereafter said transcript and exhibits shall be made available by the hearing clerk for examination during official hours of business after prior request and reasonable notice to the hearing clerk.

(2) If a personal copy of the transcript is desired, such copy may be obtained upon written application filed with the reporter, and upon payment of fees at the rate (if any) provided in the contract between the reporter and the Secretary.

§ 900.62 Subpenas.

(a) *Issuance of subpenas.* The attendance of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may, by subpena, be required at any designated place of hearing. Subpenas may be issued by the Secretary or by the judge, under the facsimile signature of the Secretary, upon a reasonable showing by the applicant of the grounds, necessity and reasonable scope thereof.

(b) *Application for subpena duces tecum.* Subpoenas for the production of documentary evidence, unless issued by the judge upon his own motion, shall be issued only upon a certified written application. Such application shall specify, as exactly as possible, the documents desired and shall show their competency, relevancy, and materiality and the necessity for their production.

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§ 900.64 The Administrative Law Judge's decision.

(a) *Corrections to and certification of transcript.* (1) At such time as the judge may specify, but not later than the time fixed for filing proposed findings of fact, conclusions and order, or briefs, as the case may be, the parties may file with the judge proposed corrections to the transcript. (2) As soon as practicable after the filing of proposed findings of fact, conclusions and order, or briefs, as the case may be, the judge shall file with the hearing clerk his certificate indicating any corrections to be made in the transcript, and stating that, to the best of his knowledge and belief, the transcript, as corrected, is a true, correct, and complete transcript of the testimony given at the hearing, and that the exhibits are all the exhibits properly a part of the hearing record. The original of such certificate shall be attached to the original transcript and a copy of such certificate shall be served upon each of the parties by the hearing clerk who shall also enter onto the transcript (without obscuring the text) any correction noted in the certification.

(b) *Proposed findings of fact, conclusions, and orders.* Within 10 days (unless the judge shall have announced at the hearing a shorter or longer period of time) after the transcript has been filed with the hearing clerk, as provided in paragraph (a) of this section, each party may file with the hearing clerk proposed findings of fact, conclusions, and order, based solely upon the evidence of record, and briefs in support thereof.

(c) *Administrative Law Judge's Decision.* The judge, within a reasonable time after the termination of the period allowed for the filing of proposed findings of fact, conclusions, and orders, and briefs in support thereof, shall prepare upon the basis of the record, and shall file with the hearing clerk, his initial decision, a copy of which shall be served by the hearing clerk, upon each of the parties. Such decision shall become final without further proceedings 35 days after the date of service thereof, unless there is an appeal to the

Secretary by a party to the proceeding: *Provided, however, That* no decision shall be final for the purpose of judicial review except a final decision issued by the Secretary pursuant to an appeal by a party to the proceeding.

§ 900.65 Appeals to Secretary; Transmittal of record.

(a) *Filing of appeal.* Any party who disagrees with a judge's decision or any part thereof, may appeal the decision to the Secretary by transmitting an appeal petition to the hearing clerk within 30 days after service of said decision upon said party. Each issue set forth in the appeal, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations and authorities being relied upon in support thereof. The appeal petition shall be served upon the other party to the proceeding by the hearing clerk.

(b) *Argument before Secretary — (1) Oral argument.* A party bringing an appeal may request within the prescribed time period for filing such appeal, an opportunity for oral argument before the Secretary. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Secretary, in his discretion, may grant, refuse or limit any request for oral argument on appeal.

(2) *Scope of argument.* Argument to be heard on appeal, whether oral or in a written brief, shall be limited to the issues raised by the appeal, except that if the Secretary determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all the issues to be argued.

(c) *Response.* Within 20 days after service of an appeal brought by a party to the proceeding, any other party may file a response in support of or in opposition to such appeal.

(d) *Transmittal of record.* Whenever an appeal is filed by a party to the proceeding, the hearing clerk shall transmit to the Secretary the record of the proceeding. Such record shall include: The pleadings; any motions and requests filed, and the rulings thereon; the transcript of the testimony taken at the hearing, as well as the exhibits filed in connection therewith; any statements filed under the shortened procedure; any documents or papers filed in connection with prehearing conferences; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the hearing; the judge's initial decision, and the appeal petition; briefs in support thereof, and responses thereto as may have been filed in the proceeding.

§ 900.70 Applications for interim relief.

(a) *Filing the–application.* A person who has filed a petition pursuant to § 900.52 may by separate application filed with the hearing clerk apply to the Secretary or an order postponing the effective date of, or suspending the application of, the Marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding.

(b) *Contents of the application.* The application shall contain a statement of the facts upon which the relief is requested, including any facts showing irreparable injury. The application must be signed and sworn to by the petitioner and any facts alleged therein which are not within his personal knowledge shall be supported by affidavits of a person or persons having personal knowledge of such facts or by proper documentary evidence thereof.

(c) *Answer to Application.* Immediately upon receipt of the application, the hearing clerk shall transmit a copy thereof, together with all supporting papers, to the Administrator, who shall, within 20 days, or such other time fixed by

the Secretary, after the filing of the application file an answer thereto with the hearing clerk.

(d) *Contents of answer.* The answer shall contain a statement of the objections, if any, of the Administrator to the application for interim relief, and may be supported by affidavits and documentary evidence.

(e) *Transmittal to Secretary.* Upon receiving the answer of the Administrator or upon the expiration of the time for filing the answer, the hearing clerk shall transmit to the Secretary for his decision all papers filed in connection with the application.

(f) *Hearing and oral argument.* The Secretary may, in his discretion, permit oral argument or the taking of testimony in connection with such application. However, unless written request therefor is filed with the hearing clerk prior to the transmittal of the papers to the Secretary, the parties shall be deemed to have waived oral argument and the taking of testimony.

(g) *Decision by Secretary.* The Secretary may grant or deny the application. Any action taken by the Secretary shall be in the form of an order filed with the hearing clerk and shall contain a brief statement of the reasons for the action taken. The hearing clerk shall cause copies of the order to be served upon the parties.

§ 900.71 Hearing before Secretary.

The Secretary may act in the place and stead of a judge in any proceeding hereunder. When he so acts the hearing clerk shall transmit the record to the Secretary at the expiration of the period provided for the filing of proposed findings of fact, conclusions and corders, and the Secretary shall thereupon, after due consideration of the record, issue his final order in the proceeding: *Provided, That* he may issue a tentative order in which event the parties shall be afforded an opportunity to file exceptions before the issuance of the final order.

ADMINISTRATIVE PROCEDURE ACT

THE ADMINISTRATIVE PROCEDURE PROVIDES, IN PART, (5 U.S.C. 551, et seq).

§ 551. Definitions

• • • • •

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

• • • • •

§ 553. Rule making

• • • • •

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

* * * * *

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for —

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section

557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) *be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.*

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —

* * * * *

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirements of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. *In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.*

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

§ 556. Hearings; presiding employees, powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners [Administrative Law Judge] appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may —

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) *rule on offers of proof and receive relevant evidence*;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) *regulate the course of the hearing*;

(6) *hold conference for the settlement or simplification of the issues by consent of the parties;*

(7) *dispose of procedural requests or similar matters;*

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) *take other action authorized by agency rule consistent with this subchapter.*

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses as agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties.

When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses —

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely

execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions —

(1) proposed findings and conclusion; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law —

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding,

an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but

in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

A detailed knowledge of the Orders and Regulations, and a complete understanding of how the Marketing Orders work, are essential to a proper resolution of the issues involved here. The following are some of the pertinent provisions here relevant, but it is suggested that only a reading of the entire Orders will suffice. For convenience purposes, the pre-1988 provisions are set forth first, followed by certain provisions as amended in 1988. [Emphasis has been added.]

NECTARINES GROWN IN CALIFORNIA — 7 C.F.R. PART 916

§ 916.20 Establishment and membership.

There is hereby established a Nectarine Administrative Committee consisting of eight members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he is an alternate. The members and their alternates shall be growers or employees of growers. Five of the members and their respective alternates shall be producers of nectarines in District 1. One member and his alternate shall be producers of nectarines in District 2; one of the members and his alternate shall be producers of nectarines in District 3; and one member and his alternate shall be producers of nectarines in District 4.

§ 916.21 Term of office.

The term of office of each member and alternate member of the committee shall be for 2 years beginning on March 1 of an odd numbered year and ending on the last day of February of an odd numbered year. Members and alternate members shall serve in such capacities for the portion of the term of office for which they are selected and have qualified and until their respective successors are selected and have qualified.

§ 916.22 Nomination.

* * * * *

(b) *Successor members.* (1) The committee shall hold or cause to be held, not later than February 15 of each odd numbered year, a meeting or meetings of growers in each district for the purpose of designating nominees for successor members and alternate members of the committee. *These meetings shall be supervised by the committee which shall prescribe such procedure as shall be reasonable and fair to all persons concerned.*

(2) Only growers who are present at such nomination meetings, or represented at such meetings by duly authorized employees, may participate in the nomination and election of nominees for members and their alternates.

(3) A particular grower, including employees of such grower, shall be eligible for membership as principal or alternate to fill only one position on the committee.

§ 916.23 Selection.

From the nominations made pursuant to § 916.22, or from other qualified persons, the Secretary shall select the eight members of the committee and an alternate for each such member.

§ 916.25 Acceptance.[1]

Any person selected by the Secretary as a member or as an alternate member of the Committee shall qualify by filing a written acceptance with the Secretary promptly after being notified of such selection.

§ 916.30 Powers.

The committee shall have the following powers:

(a) *To administer the provisions of this part in accordance with its terms;*

(b) *To receive, investigate and report to the Secretary complaints of violations of the provisions of this part;*

(c) To make and adopt rules and regulations to effectuate the terms and provisions of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 916.31 Duties.

The *committee* shall have, among others, the following duties:

(a) To select a chairman and such other officers as may be necessary, and *to define the duties of such officers;*

(b) To appoint such employees, agents, and representatives as it may deem necessary, and to determine compensation and *to define the duties of each;*

(c) To submit to the Secretary as soon as practicable after the beginning of each fiscal period a budget for such

[1]Exh. 393, 394, 395 are examples of forms by which the nominee states: "I am willing to serve on the [Peach, Plum, or Nectarine] Commodity Committee." Said forms provide to the Secretary information such as acres farmed, firm affiliates, and ownership in other fruit crops and acreage.

fiscal period, including a report in explanation of the items appearing therein and a recommendation as to the rate of assessment for such period;

(d) To keep minutes, books, and records which will reflect all of the acts and transactions of the committee and which shall be subject to examination by the Secretary;

(e) To prepare periodic statements of the financial operations of the committee and to make copies of each such statement available to growers and handlers for examination at the office of the committee;

(f) To cause its books to be audited by a competent public accountant at least once each fiscal year and at such times as the Secretary may request;

(g) To act as intermediary between the Secretary and any grower or handler;

(h) To investigate and assemble data on the growing, handling, and marketing conditions with respect to nectarines;

(i) To submit to the Secretary the same notice of meetings of the committee as is given to its members;

(j) To submit to the Secretary such available information as he may request;

(k) To investigate compliance with the Provisions of this part;

(l) With the approval of the Secretary, to redefine the districts into which the production area is divided and to reapportion the representation of any district on the committee: *Provided, That* any such changes shall reflect, insofar as practicable, shifts in nectarine production within the districts and the production area.

§ 916.40 Expenses.

The committee is authorized *to incur such expenses as the Secretary finds are reasonable and likely to be incurred* by the committee for its maintenance and functioning and to enable it to exercise its powers *and perform its duties in accordance with the provisions of this part.* The funds to cover such expenses shall be acquired in the manner prescribed in § 916.41.

§ 916.41 Assessments.

(a) As his *pro rata* share of the expenses which the Secretary finds are reasonable and likely to be incurred by the committee during a fiscal period, each person who first handles nectarines during such period *shall pay to the committee,* upon demand, assessments on all nectarines so handled. The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) *The Secretary shall fix the rate of assessment to be paid by each such person during a fiscal period* in an amount designed to secure sufficient funds to cover the expenses which may be incurred during such period *and to accumulate and maintain a reserve fund equal to approximately one fiscal period's expenses.* At any time during or after the fiscal period, the Secretary may increase the rate of assessment in order to secure sufficient funds to cover any later finding by the Secretary relative to the expenses which may be incurred. Such increase shall be applied to all nectarines handled during the applicable fiscal period. In order to provide funds for the administration of the provisions of this part during the first part of a fiscal period before sufficient operating income is available from assessments on the current year's shipments, the committee may accept the

payment of assessments in advance, and may also borrow money for such purposes.

§ 916.42 Accounting.

* * * * *

(2) The committee, with the approval of the Secretary, may carry over such excess into subsequent fiscal periods as a reserve: *Provided*, That funds already in the reserve do not equal approximately one fiscal period's expenses. Such reserve funds may be used (i) to defray expenses, during any fiscal period, prior to the time assessment income is sufficient to cover such expenses, (ii) to cover deficits incurred during any fiscal year when assessment income is less than expenses, (iii) to defray expenses incurred during any period when any or all provisions of this part are suspended or are inoperative, (iv) to cover necessary expenses of liquidation in the event of termination of this part. *Upon such termination, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such manner as the Secretary may determine to be appropriate: Provided, That to the extent practical, such funds shall be returned pro rata to the persons from whom such funds were collected.*

(b) All funds received by the committee pursuant to the provisions of this part *shall be used solely for the purpose specified in this part and shall be accounted for in the manner provided in this part.* The Secretary may at any time require the committee and its members to account for all receipts and disbursements.

* * * * *

§ 916.51 Recommendations for regulation.

(a) Whenever the committee deems it advisable to regulate the handling of any variety or varieties of nectarines in the manner provided in § 916.52, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, *the committee shall give consideration to current information with respect to the factors affecting the supply and demand for nectarines during the period or periods* when it is proposed that such regulations should be made effective. With each such recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 916.52 Issuance of regulations.

(a) *The Secretary shall regulate, in the manner specified in this section,* the handling of nectarines whenever he finds, from the recommendations and information submitted by the committee, or from other available information, that such regulations will tend to effectuate the declared policy of the act. Such regulations may:

(1) Limit, during any period or periods, the shipment of any particular grade, size, quality, maturity, or pack, or any combination thereof, of any variety or varieties of nectarines grown in the production area;

(2) Limit the shipment of nectarines by establishing, in terms of grades, sizes, or both, *minimum standards of quality and maturity* during any period when season average prices are expected to exceed the parity level;

(3) Fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be used in the packaging or handling of nectarines.

(b) The committee shall be informed immediately *of any such regulation issued by the Secretary* and the committee shall promptly give notice thereof to handlers.

§ 916.53 Modification, suspension, or termination of regulations.

(a) In the event the committee at any time finds that, by reason of changed conditions, any regulations issued pursuant to § 916.52 should be modified, suspended, or terminated, it shall so recommend to the Secretary.

(b) Whenever the Secretary finds from the recommendations and information submitted by the committee or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments of nectarines in order to effectuate the declared policy of the act, he shall modify, suspend, or terminate such regulation. *If the Secretary finds that a regulation obstructs, or does not tend to effectuate the declared policy of the act,* he shall suspend or terminate such regulation. On the same basis and in like manner the Secretary may terminate any such modification or suspension.

§ 916.55 Inspection and certification.

(a) Whenever the handling of any variety of nectarines is regulated pursuant to § 916.52, or § 916.53, each handler who handles nectarines shall, prior thereto, *cause such nectarines to be inspected by the Federal or Federal-State Inspection Service* and certified as meeting the applicable requirements of such regulation: *Provided*, That inspection and certification shall not be required for nectarines which previously have been so inspected and certified if such prior inspection was performed within such period as may be established pursuant to paragraph (b) of this section. Promptly after inspection and certification, each such handler shall submit, or cause to be submitted, to the committee a copy of the certificate of inspection issued with respect to such nectarines. The committee may, with the approval of the Secretary, prescribe[d] [sic], rules and regulations waiving the inspection requirements of this section where it

is determined that inspection is not available: *Provided, That* all shipments made under such waiver shall comply with all regulations in effect.

(b) The committee may, with the approval of the Secretary, establish a period prior to shipment during which the inspection required by this section must be performed.

(c) The committee may enter into an agreement with the Federal and Federal-State Inspection Services with respect to the costs of the inspection required by paragraph (a) of this section, and may collect from handlers their respective *pro rata* shares of such costs.

§ 916.62 Right of the Secretary.

The members of the committee (including successors and alternates), and any agents, employees, or representatives thereof shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in accordance therewith prior to such disapproval by the Secretary.

§ 916.64 Termination.

* * * * *

(e) The Secretary shall conduct a referendum within the period beginning December 1, 1974, and ending February 15, 1975, to ascertain whether continuance of this part is favored by the growers. The Secretary shall conduct such referendum within the same period of every fourth fiscal period thereafter.

* * * * *

Subpart — Grade and Size Regulation (Prior to 1988)

§ 916.356 Nectarine Regulation 14.

(a) No handler shall ship:

(1) Any package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided, That* maturity shall be determined by the application of color standards by variety or such other tests *as determined to be proper by the Federal or Federal-State Inspection Service: Provided further, That* nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed the aggregate area of a circle ⅜ inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ½ inch in diameter: *Provided further, That* an additional tolerance of 25 percent shall be permitted for fruit that is not well formed but not badly misshapen.

* * * * *

§ 916.356 Nectarine Regulation 14. (Applicable to 1988 and thereafter)

(a) No handler shall ship:

(1) Any lot or package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade, except that the nectarines shall be "well-matured," rather than "mature," but not overripe or shriveled: *Provided,* That nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ⅜ inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle ½ inch in diameter: *Provided further,* That an additional tolerance of 25 percent

shall be permitted for fruit that is not well formed but not badly misshapen.

(i) During the 1988 and subsequent seasons, the Federal or the Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety, except that for the Fairlane, Tom Grand, and 61-61 varieties of nectarines, not less than an aggregate area of 80 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Nectarine Administrative Committee and the Federal or Federal-State Inspection Service. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

* * * * *

FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA 9 C.F.R. PART 917

§ 917.1 Secretary.

"Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated to act in his stead.

§ 917.4 Fruit.

"Fruit" means the edible product of the following three kinds of trees (a) all varieties of plums, (b) all varieties of peaches, and (c) all varieties of pears except Beurre Hardy, Beurre D'Anjou, Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Claigeau.

§ 917.16 Designation of Control Committee.

A Control Committee is hereby established consisting of 12 shipper members and 13 commodity committee members, and the members shall be selected in accordance with the provisions of § 917.17 through § 917.19. The members shall be selected annually for a term ending on the last day of February, and said members shall serve until their respective successors are selected and have qualified.

§ 917.24 Procedure for nominating members of various commodity committees.

(a) The Control Committee shall hold or cause to be held not later than February 15 of each odd numbered year a meeting or meetings of the growers of the fruits in each representation area set forth in §§ 917.21, 917.22, and 917.23 for the purpose of designating nominees of the commodity committees. These meetings shall be supervised by the Control Committee, which shall prescribe such procedure as shall be reasonable and fair to all persons concerned.

(b) With respect to each commodity committee only growers of the particular fruit who are present at such nomination meetings or represented at such meetings by duly authorized employees may participate in the nomination and election of nominees for commodity committee members. Each such grower, including employees of such grower, shall be entitled to cast but one vote for each position to be filled for the representation area in which he produces such fruit.

(c) A particular grower, including employees of such growers, shall be eligible for membership as principal or alternate to fill only one position on a commodity committee. * * * A grower nominated for membership on the Plum Commodity Committee may be a producer who has a proprietary interest in or is an employee of a commercial plum handler: *Provided,* That at least one such nominee from each representation area shall be a producer who does not have a proprietary interest in or is not an employee of a commercial plum handler.

§ 917.32 Funds and other property.

(a) All funds received by the Control Committee, pursuant to the provisions of this part, shall be used solely for the purpose specified in this part; and the Secretary may require the Control Committee and its members to account for all receipts and disbursements.

* * * * *

§ 917.33 Powers of Control Committee.

The Control Committee shall have the following powers:

(a) To administer, as specifically provided in this part, the terms and provisions of this part.

(b) To make administrative rules and regulations in accordance with and to effectuate the terms and provisions of this part.

(c) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this part.

(d) To recommend to the Secretary amendments to this part.

§ 917.34 Duties of Control Committee.

The Control Committee shall have the following duties:

(a) To act as intermediary between the Secretary and any grower or shippers.

(b) To keep minute books and records which will clearly reflect all of the acts and transactions of said Control Committee; and such minute books and records shall be subject at any time to examination by the Secretary or by such person as may be designated by the Secretary.

(c) To investigate, from time to time, and assemble data on the growing, shipping, and marketing conditions respecting fruit as defined in § 917.4; to engage in such research and service activities in connection with the handling of such fruit as may be approved, from time to time, by the Secretary; and to furnish to the Secretary such available information as may be requested.

(d) To appoint such employees, agents, and representatives as it may deem necessary, and to determine the compensation and define the duties of each.

(e) To develop and provide the commodity committees data on shared expenses to facilitate equitable apportionment of such expenses in the development of budgets.

(f) To confer with representatives of shippers and growers of fruit produced in other states and areas with respect to the formulation or operation of marketing agreements providing for the regulation of shipments among the several states and areas in the United States in which such fruit is grown.

(g) With the approval of the Secretary establish procedures for the selection and appointment of a public member and alternate to each of the commodity committees.

(h) To establish and define the duties of additional committees or subcommittees to assist in the performance of any of the duties and functions of the Control Committee.

(i) To defend all legal proceedings against any committee members (individually or as members) or any officers or employees of such committees arising out of any act or omission made in good faith pursuant to the provisions of this part.

(j) To cause the books of the Control Committee to be audited by a competent accountant at least once each fiscal period and at such other time or times as the Control Committee may deem necessary or as the Secretary may request. Such audit shall indicate whether the funds have been received and expended in accordance with the provisions of this part.

* * * * *

§ 917.36 Expenses.

Each commodity committee is authorized to incur such expenses as the Secretary finds are reasonable and are likely to be incurred by the said commodity committee during each fiscal period for the maintenance and functioning of such committee, including its proportionate share of the expenses of the Control Committee; and for such research an service activities relating to handling of the fruit for which the commodity committee was established as the Secretary may determine to be appropriate. The funds to cover such expenses shall be acquired by the levying of assessments as provided in § 917.37.

§ 917.37 Assessments.

(a) As his pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the Control Committee, upon demand,

assessments on all fruit handled by him. The payment of assessments for the maintenance and functioning of the committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the respective rate of assessment which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses which may be incurred during such period. At any time during or after the fiscal period, the Secretary may increase the rates of assessment in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period.

(c) In order to provide funds to carry out the functions of the commodity committee prior to commencement of shipments in any season, shippers may make advance payments of assessments, which advance payments shall be credited to such shippers and the assessments of such shippers shall be adjusted so that such assessments are based upon the quantity of fruit shipped by such shippers during such season. Any shipper who ships fruit for the account of a grower may deduct, from the account of sale covering such shipment or shipments, the amount of assessments levied on said fruit shipped for the account of such grower.

§ 917.38 Accounting.

If, at the end of a fiscal period the assessments collected are in excess of expenses incurred, each commodity committee, with the approval of the Secretary, may carry over such excess into subsequent fiscal periods as a reserve: *Provided*, That funds already in the reserve do not exceed approximately one fiscal period's expenses. Such reserve funds may be used (1) to cover any expenses authorized by

this part and (2) to cover necessary expenses of liquidation in the event of termination of this part. If any such excess is not retained in a reserve, each handler entitled to a proportionate refund shall be credited with such refund against the operations of the following fiscal period or be paid such refund. Upon termination of this part, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such manner as the Secretary may determine to be appropriate: *Provided*, That, to the extent practical, such funds shall be returned *pro rata* to the persons from whom such funds were collected.

§ 917.40 Recommendations for regulations.

(a) Whenever a commodity committee deems it advisable to regulate the handling of any variety or varieties of fruit in the manner provided in § 917.41, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, *the commodity committee shall give consideration to current information with respect to the factors affecting the supply and demand* for such fruit during the period or periods when it is proposed that such regulation should be made effective. With each such recommendation for regulation, the commodity committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 917.41 Issuance of regulations.

(a) The Secretary shall regulate, in the manner specified in this section, the handling of any variety or varieties of fruit whenever he finds, from the recommendations and information submitted by the commodity committee, or from other available information, that such regulations will

tend to effectuate the declared policy of the act. Such regulations may:

(1) Limit, during any period or periods, the total quantity of any grade, size, quality, maturity, or pack, or any combination thereof, of any variety or varieties of fruit;

(2) Limit the shipment of any variety or varieties of fruit by establishing, in terms of grades, sizes, or both, minimum standards of quality and maturity during any period when season average prices are expected to exceed the parity level;

(3) Fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be used in the packaging or handling of any fruit.

(b) The commodity committee shall be informed immediately of any such regulation issued by the Secretary, and the commodity committee shall promptly give notice thereof to handlers.

§ 917.45 Inspection and certification.

(a) Whenever the handling of any variety of a particular fruit is regulated pursuant to § 917.41 or § 917.42, each handler who handles such fruit shall, prior thereto, cause such fruit to be inspected by the Federal or Federal-State Inspection Service: *Provided*, That inspection and certification shall not be required if such fruit has previously been so inspected and certified. Promptly after inspection and certification, each such handler shall submit, or cause to be submitted, to the commodity committee a copy of the certificate of inspection issued with respect to such fruit. The commodity committees may, with the approval of the Secretary, prescribe rules and regulations waiving the inspection requirements of this section where it is determined that inspection is not available: *Provided*, That all shipments made under such waiver shall comply with all regulations in effect.

(b) The Control Committee may enter into an agreement with the Federal and Federal-State Inspection Services with respect to the costs of the inspection required by paragraph (a) of this section, for any or all fruits, and may collect from handlers their respective *pro rata* shares of such costs.

§ 917.66 Agents.

The Secretary may by a designation in writing name any person, including any officer or employee of the Government or any agency or Division in the United States Department of Agriculture, to act as his agent or representative in connection with any of the provisions of this part.

Subpart — Grade and Size Regulation (Applicable to 1988 and thereafter)

§ 917.459 Peach Regulation 14.

(a) No handler shall ship:

(1) Any lot or package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade, except that the peaches shall be "well-matured", rather than "mature," but not overripe or shriveled.

(i) During the 1988 and subsequent seasons, the Federal or Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Peach Commodity Committee and the Federal or Federal-State Inspection Service. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

(ii) A grower or handler may initiate a request for variance from a maturity guide (e.g., color chip) by calling an authorized committee fieldman to arrange for an on-site examination of the fruit. This fieldman will call the officer-in-charge of the local Federal-State Inspection Service office to accompany the fieldman to the site.

(iii) The committee fieldman and the officer-in-charge or a designee of the officer-in-charge shall accompany the requester to the site.

(iv) If either the fieldman or the inspection representative or both agree that a variance is warranted, the request for the variance and the written views of the fieldman and inspection official shall be forwarded to the maturity subcommittee for review and written determination. A copy of the written report shall be provided to the requester. The fieldman shall notify the requester when the request has been forwarded to the maturity subcommittee and whether the request will be considered at a public or a telephone meeting. The requester may participate in public meetings or telephone meetings and may provide additional information in support of the request to the chairman of the maturity subcommittee prior to a public or telephone meeting. In reaching its determination, the subcommittee shall take into account written comments, observations and recommendations of the fieldman and inspection official, and any other information provided by the requester. The inspection official shall participate in the subcommittee meeting until the deliberations are completed and the decision is reached. Decisions of the maturity subcommittee shall be made within two days from the time the request for a variance is received. A majority of the subcommittee must vote in favor of the variance for it to be implemented. The subcommittee shall prepare a written report of its determination and the reasons therefor. The fieldman shall, in a timely manner, inform the requester of the subcommittee's decision, the basis therefor, and the procedure for appealing the decision. A copy of the written report shall be provided to the requester and the Department's California Marketing Field Office in Fresno. If the requester is dissatisfied with the maturity subcommittee's determination, the requester may file an appeal in accordance with paragraph (a)(1)(vi) of this section.

(v) If neither the fieldman nor the inspection official believe a variance is warranted, the variance shall not be

granted. The requester may file an appeal from this determination as specified in paragraph (a)(1)(vi) of this section.

(vi) To file an appeal, the requester shall notify the Peach Commodity Committee manager who will immediately refer the appeal to the Appeal Committee. The Appeal Committee shall consist of the Chairman of the Plum Committee, the Chairman of the Nectarine Committee, and the appropriate Federal-State shipping point inspection program supervisor, or their designees. The Appeal Committee shall review all documentation and any further information provided by the requester. Decisions of the Appeal Committee must be made within one day from the time the Peach Commodity Committee manager is notified of the appeal. A majority vote of the Appeal Committee is needed to grant a variance. The Appeal Committee may hold telephone meetings. The Appeal Committee shall prepare a written report of its determination and the reasons therefor. A representative of the Appeal Committee shall in a timely manner, inform the requester of the Appeal Committee's decision and the reasons therefor. A copy of the written report shall be provided to the requester, to the committee manager, and to the California Marketing Field Office.

§ 917.460 Plum Regulation 19.

(a)(1) No handler shall ship any lot of packages or containers of any plums unless such plums grade at least U.S. No. 1, except that the plums shall be "well-matured," rather than "mature" but not overripe or shriveled.

ISSUES

In *Wileman/Kash I*, the Judicial Officer's recognition of what issues were presented emanated from his holding that the Petitioners' evidence and pleadings, including their Petitions, related to the wisdom or folly of how well the Secretary, and his Committees, were carrying out the Order provisions which the Judicial Officer maintains were properly promulgated, and the correctness of the Secretary's actions may not be questioned. *Cf. Farm Fresh,* Pet. M106-2, April 12, 1990, where the Judicial Officer indicates *only* Petitioner may raise issues — not the Judicial Officer nor the Administrative Law Judge *sua sponte* and that rulings are to be made on prayers for relief. The Petitioners in *Wileman/Kash II* have not been deficient in this respect. Their pleadings more than cover the issues raised herein.

Section 900.52 of the Regulations pertaining to the institution of a proceeding require a Petitioner to set forth "* * * clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the order, or the interpretation or application thereof * * * ."

A § 8(c)(15)(A) proceeding "is instituted by a private party, who is responsible for framing the issues." and rulings are made upon the prayers of the Petition (which reference herein includes the Amended Petition). Thus, it becomes relevant to note the scope of the Petition filed herein.

The Petitioners specific prayers for relief are found in six legal pages of their Petition/Amended Petition and, summarized and restated, seek:

A. A ruling that §§ 917.460 (Plum Regulation No. 19), 917.459 (Peach Regulation No. 14) and 916.356 (Nectarine Regulation No. 14), and their respective tables showing the specific "maturity tests" or other "color standards," of the Nectarine, Plum and Peach regulations issued in 1988,

and the obligations imposed therewith, as written and/or as applied, are not in accordance with law;

B. A ruling that the specific color standards and/or maturity tests referenced above, as written and/or as applied, are not in accordance with the law; are a denial of equal protection of the laws; result in a denial of due process of law since they amount to a "taking" without due process and without just compensation;

C. A ruling that the maturity tests and/or "color standards," and the procedures in determining said maturity tests and/or color standards, and the procedures to be utilized in requests for changes or variances to the maturity tests and the appeals, are a denial of due process of law since they constitute procedures involved without lawful delegation and/or constitute an unlawful delegation of authority to Petitioners' competitors;

D. A ruling that the specific maturity tests and/or "color standards" referenced above, as written and/or as applied, are arbitrary, capricious and not based upon substantial evidence and were enacted in violation of the Administrative Procedure Act and are null and void;

E. A ruling that the specific *size* regulations for Nectarines and Peaches, issued as Interim Final Rules by the Secretary in May, 1988, as written and/or as applied, were enacted in violation of the Administrative Procedure Act and are void, and/or are in actuality volume control and are contrary to the Agricultural Marketing Agreement Act;

F. A ruling that the specific maturity tests or specific color standards referenced above, as written and/or as applied, are in effect volume regulation, and violative of the Agricultural Marketing Agreement Act;

G. A ruling that neither the Nectarine Administrative Committee, the Plum Commodity Committee, the Peach Committee, the Control Committee of the California Tree

Fruit Agreement, the Maturity Subcommittees of any of the above-described Committees nor the "Appeals Committee" are empowered, by statute, delegation, or in any other manner, to set and determine, change, vary, deny changing, deny varying, or ruling on the appeal from the denial of specific color standards, or other maturity tests;

H. A ruling that the assessments issued for the 1988 and 1989 harvest seasons are not in accordance with law, since they were not enacted in accordance with the Administrative Procedure Act and since they are violative of Petitioners' First Amendment Constitutional rights;

I. A ruling that the assessments levied and collected from Petitioners from 1980 through 1986, and the assessments levied against Petitioners in 1987 through 1989 and subsequent seasons, are not in accordance with law since the majority of the assessments are being used to pay for promotion, other forms of research, and other items reflecting the ideological, economic, philosophical, and commercial viewpoints of Petitioners' competitors, to which Petitioners do not subscribe and are violative of the First Amendment of the United States Constitution and are not in accordance with law as the majority of the assessments are used to pay for promotion, and other forms of research, which violate the equal protection rights of Petitioners protected by the deprivation of liberty clause within the Fifth Amendment of the United States Constitution;

J. A ruling that the advertising and expense assessments collected from Petitioners from 1980 through 1986, and the advertising and expense assessments levied against Petitioners in 1987 through 1989, and subsequent seasons, are being expended without the approval, required by law, of the Secretary, pursuant to 7 U.S.C. § 610(b)(2)(ii), and in a manner violative of the laws of the United States of America and in violation of the provisions of the

Agricultural Marketing Agreement Act and the Administrative Procedure Act.

K. A ruling that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any retroactive relief or any monetary damages for financial injuries as a result of an invalid Marketing Order or Marketing Agreement regulation and are invalid because they do not afford any timely or effective relief and thus are a violation of the due process clause of the United States Constitution;

L. A ruling that the Secretary has failed to comply with the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" by refusing to grant any form of interim relief, despite the irreparable injury that would occur in the event interim relief is not granted, and thus the Secretary has failed to follow his own rules of procedure;

M. A ruling that Petitioners need not exhaust their administrative remedies pursuant to the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" and § 608c(15)(A) of the Agricultural Marketing Agreement Act, since the Secretary has already determined that Petitioners' Petition would be futile to exhaust since he has already made up his mind that no violation stated herein will be found to have occurred, no remedy can be afforded, no retroactive relief can be granted, and no relief at all will be granted to the Petitioners;

N. A ruling that the entire testimony and evidence and record of the 7 U.S.C. § 608c(15)(A) Petition hearing (AMA Docket Nos. F&V 916-1, 917-3, 916-2, and 917-2) conducted in February and March of 1988, involving the identical parties to the instant 15(A) proceeding, be

incorporated by reference into this hearing record. With respect to this prayer for relief, the Administrative Law Judge, as part of the oral hearing, incorporated by reference all testimony received, all exhibits admitted and any and all judicial/administrative notice taken at the hearing conducted in February and March of 1988 as to Peaches, and as to Plums and Nectarines, to the extent said prior hearing was referenced by the parties as to the 1988-89 Harvest seasons. The incorporation by reference, of the aforementioned 15(A) Petition hearing, substantially reduced the likelihood of a duplication of the issues presented in the previous 15(A) hearing, did not prejudice either party to the instant action and benefitted judicial economy. Although originally opposed by Respondent, such incorporation was subsequently sought by Respondent and utilized by the Judicial Officer through consolidation of the proceedings.

O. A ruling that, to the extent of any Government claim that Petitioners have an obligation to pay the levied assessments imposed by the Secretary of Agriculture, there shall be a *"set-off"*, (pursuant to common-law set-off rights and statutory set-off rights, including 31 U.S.C. § 3701, *et seq.*, and as otherwise allowed by law), against the monetary damages suffered by Petitioners as a result of unconstitutional and unlawful regulations and enforcement of the Marketing Orders; and,

P. A ruling that, pursuant to the Equal Access To Justice Act, 5 U.S.C. § 504 and/or Federal Rule of Civil Procedure § 11, due to the special circumstances herein, Petitioners are entitled to be awarded reimbursement of all their fees and expenses, including reasonable attorney's fees and expert witnesses' fees.

To understand the issues, it must be kept in mind that the Petitioners, at times, have pleaded in the alternative. However, in their Petition the following issues and factual assertions have been raised. The following factual issues

raised in the Petition have been set forth herein in a manner to assist a reviewing Federal Court and, also, so as to not preclude consideration of the Petitioners' issues on the basis of failure to plead.

Petitioners have set forth contentions as to why various provisions of the Nectarine, Plum and Peach Marketing Orders or the interpretation, administration, or application thereof, as written, and/or as applied are not in accordance with law.

These reasons (summarized) given for the relief prayed in their Petition are:

(1) Petitioners claim that various provisions of the Nectarine, Plum and Peach Orders, in their language and/or in their application, and/or in their obligations imposed in connection therewith, are void and not in accordance with law.

(2) Petitioners claim that certain provisions of said Orders are a violation of the First Amendment of the United States Constitution and the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

(3) Petitioners claim that the promulgation of the "well-matured" color chip standard was arbitrarily and capriciously imposed upon the tree fruit industry with no substantial basis nor purpose because the "well-matured" color chip standard does not objectively and rationally evaluate the internal maturity of fruit nor determine good consumer quality and/or good marketable quality. When the Committee members promulgated the maturity regulations themselves rather than making recommendations to the Secretary, the issuance and enforcement of the color chip standards permitted them to improve their own profitability and diminish the earnings of Petitioners.

(4) Petitioners claim that various indicated provisions of said Orders are void as being an improper delegation of authority from the Secretary of Agriculture to the Nectarine, Plum and Peach Committees, the Control Committee of the California Tree Fruit Agreement, and the Nectarine, Plum and Peach Maturity Subcommittees, and their respective Appeal Committees.

(5) Petitioners claim that various provisions of said Orders, as interpreted and as applied, are void as there has been no properly delegated authority to either the Nectarine, Plum and Peach Committees, the Nectarine, Plum and Peach Maturity Subcommittees, the California Tree Fruit Agreement, and the Appeal Committees.

(6) Petitioners claim that various provisions of the pertinent Orders are void since the Administrative Procedure Act was not followed with respect to implementing the "laws".

(7) Petitioners claim that various provisions of said Orders, and the regulations executed thereunder, are void and not in conformity with the law with respect to assessments assessed against the Petitioners with respect to the fruits involved.

(8) Petitioners contend that certain provisions of said Marketing Orders, and the rules and regulations executed thereafter as written, and/or in their application, and/or in their obligations imposed in connection therewith, are a violation of procedural and substantive due process since, in the application of "regulations" which were not promulgated pursuant to law, or in those rules which, although promulgated pursuant to law but not applied in accordance with law, amount to a complete "taking" of the subject fruit, without just compensation and without furthering any proper governmental purpose, and without

providing a pre-deprivation hearing in accordance with law.

(9) Petitioners contend that whatever delegation of authority may have existed to the Committees, made up of competitors of Petitioners, such delegation was contrary to the intent and policy of Congress in enacting the Agricultural Marketing Agreement Act and contrary to various Supreme Court rulings.

(10) Petitioners further contend that the Secretary of Agriculture for each harvest season from 1980 to the present season, failed to engage in reasoned decision-making in establishing regulations authorizing the imposition of forced assessments, all in violation of the Administrative Procedure Act. Further, in failing to engage in reasoned decision-making, the Secretary failed to engage in notice and comment and made no provision for notice and comment regarding:

(a) Whether the tree fruit industry benefits from a "generic" advertising program;

(b) Whether the tree fruit industry should continue year to year with the "generic" advertising program;

(c) Whether *pro rata* credits from the forced advertising assessments should be provided to handlers engaging in direct, specific, brand-name advertising programs;

(d) In what manner advertising programs should be conducted;

(e) What, if any, limitations should be placed on the Committees in regards to the monetary level allowed to be expended on a "generic" advertising program;

(f) How advertising money, if any, should be spent; and

(g) Which public relations firm, if any, should be retained.

These contentions of Petitioners are raised not for the purpose of having the Secretary re-examine his position herein (which would be improper and beyond the scope of this proceeding) but rather to show that the decisions and determinations which did come forth lacked necessary foundation and evaluation.

(11) Petitioners also contend that the monetary assessments for Nectarines, Plums and Peaches for the 1988 and subsequent seasons are invalid, were not enacted according to law, nor applied according to law, and were not enacted in accordance with the Administrative Procedure Act, and that their adoption and/or enforcement is not in accordance with law.

(12) The Petitioners maintain that the monetary assessments, for 1980 through 1988 and subsequent seasons, are invalid and unconstitutional. [This contention for 1980 through 1988 is applicable only to the Peach Order assessments inasmuch as said contention with respect to Nectarines and Plums was adjudicated in the *Wileman/Kash I* case unless the consolidation by the Judicial Officer of the two *Wileman/Kash* cases is sufficient reason to re-examine *Wileman/Kash I.* Accordingly, only the harvest seasons for 1988 and subsequent years are to be adjudicated in this case with respect to Nectarines and Plums except to the extent altered by the Judicial Officer's "consolidation" of *Wileman I* and *Wileman II*, which was done, upon Motion of the Respondent.] The reasons the Petitioners so contend, in this regard, is set forth in the allegation that at least fifty percent of the assessments compelled to be paid by the Petitioners are violative of the First Amendment of the Constitution of the United States because said assessments result in compulsory subsidization of philosophical,

ideological, economic, and commercial activities engaged in by the Nectarine, Plum and Peach Committees to which the Petitioners object, and which they maintain are in contravention of the Supreme Court's holdings and the Constitution of the United States. Accordingly, such assessments are alleged to be invalid, not enacted according to law, nor applied according to law, and, in particular, not enacted in accordance with the Administrative Procedure Act, and their "adoption" or "approval" by the Secretary, and/or collection of assessments, is not in accordance with law, but rather, in a manner violative of the Administrative Procedure Act. Additionally it is maintained that all assessments for each season, are null and void as they were adopted and/or collected for expenditures which are not authorized by the Agricultural Marketing Agreement Act, and/or for expenditures which are specifically prohibited by the terms of the Agricultural Marketing Agreement Act and/or by the terms of other laws. Also, all assessments for each season are said to be null and void because the "decisions" to make said expenditures are decisions accomplished in a manner violative of the law (including, but not limited to, lack of proper public notice and participation and public decision-making, input and openness as required by "the sunshine" laws); *and/or* because said "decisions" to make said expenditures and said expenditures themselves, were not previously approved, properly authorized in accordance with the law, by the Secretary of Agriculture; and/or because some expenditures from said assessments were for unauthorized and/or legally prohibited purposes.

(13) Petitioners also contend that the Nectarine, Plum and Peach Orders assessments for 1980 through the 1989 and subsequent seasons are invalid and unconstitutional as they are violative of equal protection as applied through the Fifth Amendment's deprivation of liberty provision, in that California growers of Nectarines, Plums and Peaches

are discriminated against in relation to growers of the same tree fruit in other states, as well as being discriminated against in relation to growers of other commodities within the State of California.

(14) Additionally, the Petitioners maintain that the Interim Final rules issued by the Secretary dated May 24, 1988, and subsequent final rules, regarding the new maturity regulations, the maturity testing devices, including color chips, the color chip variance procedures, and fruit size elimination, for Nectarines, Plums and Peaches, are invalid because the Administrative Procedure Act was not followed, and/or otherwise are not in accordance with the law as written and/or as applied, and thus are null and void. Additionally, it is maintained they are null and void because they are violative of the Administrative Procedure Act inasmuch as they did not sufficiently address comments submitted, they are arbitrary and capricious; they were not premised on a substantial basis; alternatives were not considered; and/or otherwise are not in accordance with the law as written and/or as applied.

(15) It is further argued that the budgets and assessments for the Nectarine, Plum and Peach Marketing Orders for the 1980 through 1989 and subsequent seasons are violative of the Administrative Procedure Act since they are improperly retroactively imposed, that there is no substantial basis and purpose for said assessments and budgets, that the Secretary failed to review the alternatives and there is "no good cause" and/or "no emergency" exception (pursuant to Title 5 U.S.C. § 553) for non-compliance with the notice-and-comment procedures in promulgating the budgets and assessments for the 1980 through 1989 and subsequent seasons.

(16) The Petitioners raise the question of whether the imposition of advertising assessments, pursuant to 7 C.F.R. §§ 916.45 and 917.39, is an unlawful delegation

of the Constitutional authority to levy taxes. They maintain that insufficient legislative guidelines, restrictions and limitations have been placed upon the Secretary of Agriculture for Congress to have legally delegated its taxing power. Therefore, it is argued that the collection of assessment "taxes" pursuant to 7 C.F.R. §§ 916.41 and 917.37 is void as an improper unrestricted delegation of authority.

(17) Petitioners seek a declaration that as a tax, the advertising assessments must be declared null and void as the Secretary of Agriculture has not been properly delegated the authority by Congress, if indeed such authority could be delegated, to impose taxes on the tree fruit industry. By definition, the advertising assessments imposed on the tree fruit industry shall be done in the "public interest" 7 U.S.C. § 608c(6)(I), it being maintained that advertising assessments cannot be deemed "fees," but must be categorized as "taxes," as any benefit inures to the public and not to Petitioners.

(18) It is alleged that the Secretary has violated the "Rules of Practice Governing Proceedings on Petitions to Modify Or To Be Exempted From Marketing Orders," and thus denied Petitioners due process and equal protection under the law, by refusing to follow his own rule in § 900.70 of Title 7 C.F.R., by continuously determining that interim relief is unavailable with respect to any administrative Petition filed pursuant to Title 7 U.S.C. § 608c(15)(A).

(19) Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7 C.F.R. § 900.50 *et seq.*) are invalid because they do not afford any timely or effective relief and thus are a violation of the due process and equal protection clauses of the United States Constitution.

(20) Petitioners also contend that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7 C.F.R. § 900.50 *et seq.*) are invalid to the extent that they do not provide Petitioners with any timely, adequate, pretaking equitable relief and do not provide any timely or adequate post-taking equitable relief and do not provide any timely or adequate post-taking monetary relief, particularly to the extent that they do not afford any retroactive monetary relief or any prospective monetary damages for any financial injury suffered as a result of invalid provisions of the Nectarine, Plum or Peach Marketing Orders or their invalid application.

(21) Petitioners also contend that the administrative and legal positions of the Secretary of Agriculture were not "substantially justified" and as a result of the arbitrary and capricious actions undertaken by the Nectarine, Plum and Peach Committees, their Maturity Subcommittees, California Tree Fruit Agreement and the United States Department of Agriculture, Petitioners should be awarded fees and expenses, including attorney's fees and the reasonable expenses of expert witnesses, pursuant to the Equal Access To Justice Act, 5 U.S.C. § 504, and/or pursuant to Federal Rule of Civil Procedure § 11, and/or as otherwise allowed by law. It is noted that the use of expert witnesses was helpful in this proceeding, particularly with respect to demonstrations and testimony establishing that the color chip test was not necessarily accurate as to establishing maturity and that other tests could and were utilized to determine maturity.

The Petitioners set forth a detailed statement of requested and proposed facts, comprising approximately twenty-five legal pages. There is no doubt but that the issues and facts have been more than adequately presented. Any deficiencies in pleadings in *Wileman/Kash I* as perceived by the Judicial

Officer, are more than compensated for in the extensive and detailed pleadings in *Wileman/Kash II*.

During the hearing, and as reflected in the record, numerous stipulations and/or stipulated responses were entered into. These take on material impact herein and are also significant because, except for a few conclusory requested Findings of Fact, the Respondent has not sought Findings of Fact. Supposedly, on appeal the Respondent will not present to the Judicial Officer Findings of Fact which it has not sought initially.

FINDINGS OF FACT

1. Petitioner, Wileman Bros. & Elliott, Inc., is a California corporation incorporated on May 10, 1948, and has a principal place of business located at 40232 Road 128, Cutler, California. Its mailing address is P.O. Box 309, Cutler, California 93647.

2. Petitioner Kash, Inc., is a California corporation, incorporated on May 28, 1968, and has a principal place of business located at Parlier, California. Its mailing address is P.O. Box 310, Parlier, California 93648.

3. Petitioner Wileman Bros. & Elliott, Inc., hereinafter, for convenience purposes sometimes referred to as Petitioner Elliott, and Petitioner Kash, Inc., hereinafter sometimes referred to as Petitioner Kash, are both growers and handlers of Plums and Nectarines. Petitioners handle their own varieties of Plums and Nectarines as well as that of outside growers' varieties of Plums and Nectarines.

4. Petitioner Kash, Inc., is also both a grower and a handler of Peaches.

5. Petitioner Elliott is the only commercial grower and handler of Tom Grand Nectarines. Petitioner Elliott is one of two growers of Ebony Plums and one of two handlers of Ebony Plums, and grows and handles a significantly greater volume of Ebony Plums than the one other grower of Ebony Plums.

6. Petitioner Elliott, as a corporation, has been a handler of Nectarines and Plums since 1948. Petitioner Kash, Inc., as a corporation, has been a handler of Nectarines, Plums, and Peaches since 1968.

7. Petitioners, Wileman Bros. & Elliott, Inc., and Kash, Inc., subsequent to the granting of a Motion to Consolidate their separate 15(A) Petitions, had their grievances heard in a hearing conducted during February-March of 1988. Said

hearing was presided over by Dorothea A. Baker, Administrative Law Judge, United States Department of Agriculture, in case No. AMA Docket Nos. F&V 916-1, 917-2, 916-2 and 917-3. Said (15)(A) Petition hearing encompassed certain issues regarding the 1980 through 1987 harvest seasons for Nectarines and Plums. That proceeding raised a substantial number of issues relating to various provisions of the Nectarine and Plum Marketing Orders. The hearing involved the admission of substantial evidence through oral testimony, the admission of hundreds of exhibits, and factual evidence which was admitted through judicial/official, and administrative notice being taken by the Administrative Law Judge. The Initial Decision rendered by the Administrative Law Judge on May 19, 1989, was reversed in substantial respect by the Department's Judicial Officer on July 9, 1990, wherein he found that the Petitioners were not entitled to any relief and dismissed their Petitions.

8. On or about May 4, 1988, the Nectarine Administrative Committee recommended the adoption of an 18 cents per carton assessment against each container of Nectarines packed by Petitioners. Of that 18 cents, only (approximately) 5 cents was for inspection of those cartons of Nectarines, and over 10 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales material; publicity; educational activities; food service activities; T.V. and Radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; production research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Nectarine Administrative Committee in May, 1988, was approximately One Million Seven Hundred Sixty-one Thousand Eight Hundred Eight-six Dollars ($1,761,886.00).

9. From 1980 through the present harvest season over half of the assessments, imposed by the Nectarine Administrative Committee have been used for "Market Development".

10. On or about May 4, 1988, the Plum Administrative Committee recommended the adoption of a 19 cents per carton assessment against each container of Plums packed by Petitioners. Of that 19 cents only (approximately) 6 cents was for inspection of those cartons of Plums and approximately 10 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales materials; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Plum Administrative Committee in May 1988 was approximately One Million Eight Hundred Thirty-one Thousand Four Hundred Fifty-nine Dollars ($1,831,459.00). From 1980 through the present harvest season, over half of the aforementioned assessments have been used for "Market Development".

11. On or about May 4, 1988, the Peach Administrative Committee recommended the adoption of an 18 cents per carton assessment against each container of Peaches packed by Petitioner, Kash, Inc. Of that 18 cents only (approximately) 6 cents was for inspection of Peaches and approximately 9 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales material; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising;

Canadian promotions; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Peach Administrative Committee in May 1988 was approximately One Million Two Hundred Twenty-five Thousand Four Hundred Thirty-five Dollars ($1,225,435.00). Regarding said Peach assessments, from 1980 through the present harvest season, over half of the assessments paid by Petitioner Kash, Inc., have been used for "Market Development".

12. Approximately five to six cents per container is currently being assessed against Petitioners to provide for inspection services, (performed by the Shipping Point Inspection), to inspect fruit.

13. Any monies expended by Petitioners for promotion of their specific brand of fruit receives no *pro rata* credits toward the amount of advertising assessments levied against Petitioners.

14. California's tree fruit handlers, subject to Marketing Orders 916 and 917, are the only tree fruit handlers subject to advertising assessments. Other State's handlers are not required to advertise under Federal Marketing Orders.

15. On April 8, 1988, the Secretary of Agriculture issued proposed rules with respect to Plum sizes, maturity, and requests for variances, which proposed rules sought to define the term "well-matured" (53 Federal Register 11669).

16. On April 18, 1988, the Secretary of Agriculture issued proposed rules with respect to Nectarine and Peach sizes, maturity, requests for variances, which proposed rules sought to define the term "well-matured" (53 Federal Register 12690, regarding Nectarines); (53 Federal Register 12694 regarding Peaches).

17. With respect to the Peach, Plum and Nectarine proposed rules described in the immediately preceding two

stipulations, (Paragraphs 15 and 16) a fifteen-day comment period, was provided except as to Plums for which a seven-day extension was granted.

18. Said proposed rules, with respect to Peaches, Plums and Nectarines, were issued four months after the respective Peach, Plum and Nectarine Committees met in December 1987.

19. No documents exist which in any way support Respondent's position that "color-chips" objectively, rationally, and reasonably evaluate and test the actual internal maturity of fruit, other than the rulemaking record produced in this proceeding. (Contained in Exhibit Nos. 31, 32 and 33, and all subparts thereto.)

20. The position of the Respondent is that everything relied upon by the Secretary with respect to the stipulated responses, is contained in Petitioners' and Respondent's Joint Exhibit Nos. 31, 32, and 33, and the subparts thereto, which comprise the entire "rulemaking record." If the data is not in those Exhibits, the Secretary did not have it.

21. The following documents do not exist other than to the extent they may be in the rulemaking record produced in this proceeding:

(1) No documents exist regarding the Secretary's consideration, if any, during the 1980 harvest season through the 1987 harvest season, of other possible testing devices, other than "color chips," for measuring the internal maturity of Peaches, Plums and/or Nectarines; and

(2) No documents exist other than the rulemaking record showing that the "color chips" selected for each particular variety of Peaches, Plums and Nectarines, were objectively and rationally tested and evaluated to judge the internal maturity of that particular variety of fruit.

22. Other than the aforesaid rulemaking record, identified as Joint Exhibits 31 and 32, the Respondent relies upon nothing to support each and every particular "color chip" which was designated and selected by Respondent for each variety of Plum, for each variety of Nectarine, and for each variety of Peach during the 1988 and 1989 harvest seasons.

23. Other than what is contained in Joint Exhibits 31 and 32, there are no documents, studies or reports regarding the Secretary's consideration of any other testing devices, other than "color chips," to test the internal maturity of Peaches, Plums and Nectarines, for the 1988 and 1989 harvest seasons.

24. The rulemaking record (Exhibits 31, 32, and 33, and all subparts thereto) does not include "color chips," in the physical sense. A reviewing Court may not go to the *rulemaking* record and look at the "color chips" which are used as the determining factor with respect to the ascertainment of maturity and thus, the determining factor in the ability of a handler to pick, pack and ship his produce. The "color chips" which a reviewing Court may view are evidence in this administrative proceeding. When a reviewing Court looks at the color chips in evidence in both *Wileman/Kash I* and *Wileman/Kash II*, it is looking at demonstrative data, not used by the Secretary in his legislative capacity.

25. Other than Joint Exhibits 31 and 32, no documents exist with respect to the Secretary of Agriculture having engaged in any Administrative Procedure Act notice and, opportunity for comment, with respect to exercising his discretionary authority regarding whether or not to implement an advertising program with respect to Peaches, Plums and/or Nectarines. In regard to this stipulated response, the Respondent reserved the right to argue and make reference to the 1971 formal rulemaking procedure.

26. Other than Joint Exhibits 31 and 32, there are no documents evidencing the publication by the Secretary of Agriculture of any notice and/or providing any opportunity for comment with respect to the decision of whether or not to institute a "generic" advertising program with respect to Peaches and/or Plums and/or Nectarines and said Joint Exhibits 31 and 32 are the sole documents establishing whether or not there has been compliance with the requirements of the Administrative Procedure Act. Respondent reserved the right to reference the 1971 formal rulemaking procedure.

27. Other than Joint Exhibits 31 and 32 no documents exist evidencing that the Secretary of Agriculture has ever published notice, and/or provided an opportunity for comment, with respect to the manner in which to spend advertising assessment funds collected. (i.e., whether or not the funds should be spent on "generic" rather than brand label advertising; whether the funds should be spent and allocated among the various advertising media; what public relation's firm if any, should be retained, etc.) In this respect the Respondent reserved the right of referring to the 1971 formal rulemaking procedure.

28. The Respondent's stipulated response to the following is that no documents exist in this regard other than those documents provided in Petitioners' and Respondent's Joint Exhibits 31 and 32 and the Respondent's response in that regard is that there is an understanding that the documents therein, that will be referred to, are those relating to the Secretary's approval of the Committees' budgets. Said stipulated response relates to the following:

> Documents relating to whether the Secretary of Agriculture has ever set any monetary limitation on the Committees as to the cost of each generic advertising program for Peaches, Plums and Nectarines.

29. The following request was made: the rulemaking record upon which Respondent relies to support its position that advertising assessments have satisfied the requirements of the Administrative Procedure Act from 1980 through the present with regard to Peaches, Plums and Nectarines. The stipulated response to this request was that Joint Exhibit 33 is the entire rulemaking record with respect to advertising for the harvest seasons 1980 through 1987. The Respondent reserved the right to reference the 1971 formal rulemaking procedure which occurred when the Peach, Plum and Nectarine Marketing Orders were amended on or about 1971, after the Act was amended on or about 1965.

30. A stipulated response was made to the request for those documents relating to the extent, if any, the Secretary of Agriculture provided a "substantial basis and purpose statement" as required by the Administrative Procedure Act, regarding the assessment rates from 1980 through the present with regard to the advertising assessments applicable to Peaches, Plums and Nectarines. The stipulated response was: The Secretary relies upon Joint Exhibits 31, 32 and 33.

31. The Respondent admits that the Secretary's imposition of "final rules" regarding assessments for Peaches, Plums and Nectarines for the years 1980 through 1987 was not preceded by "proposed rules" allowing for a thirty-day notice and comment period.

32. Respondent admits that the "proposed rules" issued in 1988 regarding Peach, Plum and Nectarine assessment rates did not provide for a thirty-day notice and comment.

33. Joint Exhibits 31, 32 and 33 are the only documents, and constitute the entire rulemaking record, regarding expenses and advertising assessments for Peaches, Plums and Nectarines commencing with the 1980 harvest season through the present. (Tr. 737). With respect to that

acknowledgment, the Respondent reserved the right to reference the rulemaking records.

34. The Respondent denied the assertion that the rulemaking record (Joint Exhibits 31, 32 and 33 and all subparts thereto) failed to establish that the Secretary of Agriculture ever engaged in notice and comment as to whether or not to advertise or *in* what manner to advertise. Production of the Joint Exhibits 31, 32, and 33, and their subparts, constitutes the sole basis for the Respondent's response to the effect that the Secretary abided by the Administrative Procedure Act, with the Respondent reserving the right to explain the documents contained therein by referencing the "formal" rulemaking record of 1971 when the Peach, Plum and Nectarine Marketing Orders were amended. [The Respondent has continuously objected to the Petitioners adducing documents into evidence with respect to the implementation and operation of the Orders. However, when it comes to the Respondent's reliance upon the rulemaking records, the Respondent reserves the right to "explain" such documents. Thus, fairness dictates that both parties have an opportunity to "explain" and reference the rulemaking records.]

35. The Respondent admitted the following stipulation, with the exception noted below. The admission is:

> Respondent admits that, from the 1980 season through and including the present, the Secretary of Agriculture has never provided any notice and comment and given no statement in the Federal Register whatsoever, with respect *to how much of the assessments for peaches, plums and nectarines were earmarked to be utilized for advertising, promotion and production research.* (Emphasis added).

The Respondent admitted the above except as regards the language contained within the proposed and final rules for the 1988 and 1989 seasons. (Tr. 743).

36. The Respondent admits the following statement, with reservation to the Respondent, of the right to reference the formal rulemaking record of 1971. The admitted statement is as follows:

> Respondent admits that, from the 1980 season through the present, with respect to peaches, plums and nectarines, the Secretary of Agriculture has never published in the Federal Register any statement with regard to his determination that advertising is beneficial to the handler or that generic advertising is beneficial to the handler and/or beneficial to the grower, other than the Secretary making the following statement — "It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the Act" — * * *.

37. The Respondent admits the following statement reserving unto the Respondent the right to explain said admissions with respect to the years' 1988 and 1989 harvest seasons and to the mention in Respondent's post-hearing brief that this was a publication in 1988 and 1989 that gave notice although not specifically with respect to those items. The Respondent reserved the right to argue that the notice that was provided would "somehow have allowed for that type of comment." The admission of the Respondent is to the following:

> From the 1980 season through the present, the Secretary of Agriculture has never published in the Federal Register any notice and comment opportunity regarding how the generic advertising program for peaches, plums, and nectarines should be assessed, i.e., on a per carton basis verses a per acre basis.

[Apparently the Respondent takes the position that with respect to the years 1988 and 1989 there was notice and comment with respect to assessments and that although not specifically mentioned, nevertheless, the Respondent argues that such general notice "would provide the public the opportunity to bring up such issues if they so [d]esired."] (Tr. 746). However, on brief, Respondent's position is that a review of the rulemaking record does not contain a requirement that the Secretary conduct formal rulemaking procedures because the formal rulemaking record provides the legal basis for the manner in which the advertising budgets are to be determined. Respondent's brief points out that the Secretary's decision states at 31 Fed. Reg. 5636 (April 9, 1966) that, "the anticipated expenses of advertising and promotion should be included in the budget of expenses submitted to the Secretary for his approval." Relying on said rulemaking record, Respondent argues that the Committees are required to include their proposed advertising expenditures to the Secretary with their proposed budget of their anticipated expenses for each fiscal year. See 31 Fed. Reg. 6525. (7 C.F.R. §§ 916.31(c) and 917.35(f)). "At that time, the Secretary may approve or disapprove of the proposed expenditures. The Secretary may adopt the proposed expenditures, he may reject portions of the recommended expenditures or he may reject all advertising expenditures for that year, just as he may do with any expenditure in the Committees' proposed budgets. The desirability of allowing the Committees' to propose advertising expenditures was determined through the formal rulemaking procedures of 1966, 1971 and 1976 as described above. If the Secretary wishes to reconsider the desirability of allowing for proposals for paid advertising under the orders, he may conduct further formal rulemaking. Indeed, Petitioners may petition the Secretary to conduct such formal rulemaking hearings. However,

Petitioners' contention that the marketing order requires additional formal rulemaking regarding the desirability of an advertising program every fiscal year is clearly disproved by examination of the formal rulemaking record."

38. The Respondent relies solely upon Joint Exhibits 31, 32 and 33 to support its denial of the following:

That an assessment based on a per carton basis rather than per acre, discriminates against some varieties of fruit which produce more cartons per acre at a lower F.O.B. price compared to those other varieties which produce fewer cartons per acre at a higher F.O.B. price.

39. The Respondent admits: For each of the years starting with 1980 through the present, with respect to Peaches, Plums, and Nectarines, the Commodity Committees retained the same advertising agency account executive to engage in advertising without competitively bidding that work to other advertising agencies.

40. The requested admission was that the Secretary of Agriculture for each harvest season from 1980 through the present season, failed to engage in reasoned decision-making in establishing regulations authorizing the imposition of forced assessments; further, he failed to engage in any notice and comment, and made no provision for notice and comment, regarding:

(a) Whether the tree fruit industry benefits from a generic advertising program;

(b) Whether the tree fruit industry should continue year to year with the generic advertising program;

(c) Whether pro rata credits from the forced advertising assessments should be provided to handlers engaging in direct specific brand name advertising programs;

(d) In what manner advertising programs should be conducted;

(e) What, if any, limitations should be placed on the committees in regard to the monetary level allowed to be expended on a "generic" advertising program;

(f) How advertising money, if any, should be spent; and

(g) What public relations firm, if any, should be retained.

In support of its denial, Respondent would rely upon joint Exhibits 31, 32, and 33, and all subparts thereto, as well as reserving the right to reference the formal rulemaking records of 1965 and 1971.

41. Joint Exhibits 31, and 32, constitute the entire rulemaking record upon which Respondent bases its contention that the regulation of Nectarine and Peach sizes was appropriate for the 1988 and 1989 harvest seasons.

42. The entire budget, and all, and the only, supporting documents thereto, which the Nectarine Committee submitted to the Secretary of Agriculture for the harvest seasons from 1980 through 1989 are stipulated into evidence as Exhibit 297 and all of its subparts.

43. The entire budget, and all, and the only, supporting documents thereto, which the Plum Committee submitted to the Secretary of Agriculture for the harvest seasons from 1980 through 1989 are stipulated into evidence as Exhibit 297 and all of its subparts.

44. The entire budget, and all, and the only, supporting documents thereto, which the Peach Committee submitted to the Secretary of Agriculture for the harvest seasons from 1980 through 1989 are stipulated into evidence as Exhibit 297 and all of its subparts.

45. The *entire budget approval documentation*, as to Peaches, Plums, and Nectarines, is set forth and stipulated

into evidence as being incorporated within Exhibit 297, and all its subparts.

46. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Nectarine Committee, for the harvest seasons 1980 through 1989 provided to the Secretary of Agriculture for his approval.

47. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Plum Committee, for the harvest seasons 1980 through 1989, provided to the Secretary of Agriculture for his approval.

48. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Peach Committee, for the harvest seasons 1980 through 1989, provided to the Secretary of Agriculture for his approval.

49. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Nectarine Administrative Committee meetings from 1980 through 1989.

50. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Plum Commodity Committee meetings from 1980 through 1989.

51. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Peach Commodity Committee meetings from 1980 through 1989.

52. The Respondent admits with respect to Peaches, Plums and Nectarines, that no other State in the United States of America, other than California, has an advertising assessment program under a Federal Marketing Order.

53. The Respondent admits that Peach, Plum and Nectarine growers in the State of Georgia do not have a United

States Department of Agriculture/Agricultural Marketing Service advertising assessment Program.

54. The Respondent admits that the Peach, Plum and Nectarine growers in the State of Colorado do not have a United States Department of Agriculture/Agricultural Marketing Service Program.

55. Respondent's reliance on Joint Exhibits 31, 32, and 33 and all subparts thereto, furnished the basis of its denial of the following: "Does the Secretary of Agriculture admit that it is a violation of Petitioners' constitutional and civil rights for AMS to contend during 15(A) proceedings that the Administrative Law Judge is not entitled to award any post-taking of fruit monetary relief, while arguing against pre-taking equitable relief in federal court, and arguing against pre-taking interim relief from the Judicial Officer?"

56. Respondent could not produce the "pink slips" of all non-personally owned automobiles driven by California Tree Fruit Agreement employees while "on duty" from 1980 through the present, because no such documents exist because the California Tree Fruit Agreement [and the Commodity Committees] do not hold any pink slips nor any other title documents with respect to automobiles driven by the California Tree Fruit Agreement since such titles have always been held by the Tree Fruit Reserve.

57. Respondent admits that the Peach Commodity Committee, the Plum Commodity Committee and the Nectarine Administrative Committee, acting through the California Tree Fruit Agreement, rent most of their furniture and equipment from the Tree Fruit Reserve, a California private, not-for-profit corporation.

58. The entire legislative history, all United States Department of Agriculture Departmental communications and all other documents relating, in any manner whatsoever, to the amendments to the Agricultural Marketing Agreement

Act, and particularly section 608c(6)(I), which allowed the Secretary of Agriculture, upon due consideration and exercise of discretion, to implement advertising assessment programs for Peaches, Plums and/or Nectarines are contained in Exhibit 297, and it subparts. The Respondent reserved the right of referring to the formal rulemaking records of 1965 and 1971.

59. The Respondent relies on Exhibit 297, and its subparts, as well as the formal rulemaking records of 1965, and 1971 as being the entire rulemaking record regarding the implementation of the advertising program with respect to Peaches, Plums and Nectarines (which occurred approximately six (6) years after the Act was amended.) Other than as stated there are no internal Departmental documents discussing and relating to the subject of whether or not advertising programs should be implemented with respect to Peaches, Plums and/or Nectarines.

60. Exhibit 302 (radio 1988-1989) and Exhibit 303 (scripts used throughout the U.S. 1986, 1987) are the scripts used on all California Tree Fruit Agreement — "California Summer Fruits" advertising promotions on radio and television stations throughout the United States when such advertising occurred during 1988 and 1989 and throughout the United States during the harvest season of 1986-1987. See also Exhibit 301 and 301(A) p. 8, 301(B) p. 9, 301(C) p. 10, 301(D) p. 11 as to script.

61. Respondent's response to the last paragraph [Paragraph No. 60] and, Exhibits 301, 302, and 303, constitute the advertising scripts (i.e. the words used during all advertisements, with respect to advertisements) paid for by either the Peach, Plum and/or Nectarine Committees or with respect to advertisements for which any of those Committees contributed any funds whatsoever for all advertisements conducted during the harvest seasons 1980 through and including 1989.

62. Exhibits Nos. 349 and 350, represent an agreed upon chart of all public relations firm billings and financial records relating to or in any other manner relevant to an inquiry of how money was spent on each different script for radio, TV, newspaper, magazine and other print media.

63. No notice and comment has been provided in the Federal Register with respect to the creation, existence, maintenance or delegation of any authority to the California Tree Fruit Agreement. The Respondent admits: "The Administrative staff hired by the Control Committee has not been delegated rule making authority."

64. The Respondent admits that setting the assessment rate is rulemaking but maintains that the approval of expenditures is not rulemaking and that to the extent compliance with the Administrative Procedure Act is required, it is reflected in Exhibit 297, and all its subparts. Through the data contained therein, Respondent contends that the Secretary of Agriculture has legally approved, to the extent he was required to comply with the Administrative Procedure Act, the expenditure of Peach, Plum and/or Nectarine Committee Assessments on (1) California Tree Fruit Agreement salaries and (2) California Tree Fruit Agreement expenses.

65. Respondent relies on the 1965 and 1971 formal rulemaking records and Exhibit Nos. 31, 32, and 33, and all subparts thereto, as furnishing the basis in support of Respondent's contention that the Secretary of Agriculture has considered, or not, the problems encountered by an East Coast consumer differentiating or distinguishing between a Georgia or Colorado Peach (which is not subject to United States Department of Agriculture/Agricultural Marketing Service advertising assessments) from that of a generically advertised California Peach; and, as such, the aforesaid data constitute the entire rulemaking records and Departmental documents, if any, with respect to studies and analyses of

the discrimination that California Peach, Plum and Nectarine handlers suffer by paying for a nation-wide advertising program that benefits growers and handlers in other states who are not so assessed.

66. The Respondent admits that on or about April 18, 1988, the Secretary of Agriculture issued Proposed Rules with respect to the proposed regulation of Nectarine and Peach sizes, maturity determinations, color chip procedures, and, variances from maturity determinations. (See 53 Federal Register 12690, regarding Nectarines; and see 53 Federal Register 12694, regarding Peaches.) A fifteen-day comment period was provided. Respondent now contends that a "good cause" exception to the thirty-day effective date existed but there was no good cause exception regarding the comment period because the Administrative Procedure Act "has no requirement of a particular 30-day comment period." Respondent relies on Exhibits 31, 32, and 33.

67. Respondent relies on Exhibit 31, and its subparts, as being the full text of any and all reports and studies considered, and the entire rulemaking record, with respect to the regulation of Nectarine size, the maturity standard, the designation of color chips. and the color chip variance procedures for the Interim Final Rules of May 27, 1988.

68. With respect to the May 27, 1988 Interim Final Rules issued regarding Peaches, Plums and Nectarines, Exhibit 31 constitutes any and all rulemaking documents.

69. Exhibit 31 contains the report of Edwin D. Thuerk as relied upon by the Secretary of Agriculture in the May, 1988, Interim Rules for Peaches, Plums and Nectarines.

70. Between the time of the proposed rule issued in April, 1988, and the Interim Final Rule issued in May of 1988, the Federal-State Inspection Service sent a letter to the Secretary of Agriculture/Agricultural Marketing

Service regarding the Federal-State Inspection Service's comments to the proposed rulemaking. That letter is contained in Exhibit 31.

71. Regarding the May, 1988 Interim Rules, Exhibit 31 constitutes the entire rulemaking record and any and all other Department of Agriculture documents and communications involving the Secretary's regulation of Plum size, and the regulation of Nectarine and Peach sizes.

72. Respondent admits, regarding the May, 1988 Interim Rules for Peach, Plum and Nectarine maturity, color chips, and size regulation, that the Secretary did not allow 30 days after publication in the Federal Register before implementing the change, but instead claimed a "good cause" exception. Exhibit 31 constitutes any and all rulemaking records and other documents upon which the Secretary of Agriculture may rely for a "good cause" exception to a 30-day notice.

73. Regarding the April and May, 1988 Federal Registers with respect to Peaches, Plums, and Nectarines, Exhibit 31 constitutes all the rulemaking records.

74. Respondent denies that the current (15)(A) proceeding does not provide Petitioners with adequate and timely relief with respect to assessments.

75. The Respondent admits that there are no documents evidencing either a written lease or a rental agreement between California Tree Fruit Agreement and the owner/landlord, which is Tree Fruit Reserve for the building which California Tree Fruit Agreement's uses as its headquarters, located at 701 Fulton Avenue, Sacramento, California. However, Respondent refers to the Management Services Minutes of various meetings which show rental amounts being charged.

76. No documents exist evidencing trademarks, registrations, copyrights, etc. for the "ripening bowl" sold and/or marketed by the California Tree Fruit Agreement.

77. Premised upon Respondent's assertions of *pending investigation*, Respondent did not adduce "all written reports of Shipping Point Inspection Inspectors regarding alleged violations of the California Tree Fruit Agreement color chip maturity requirements by Kash, Inc., during the month of June, 1989."

78. Premised upon Respondent's assertion of *pending ongoing investigations*, the Respondent produced some, but did not adduce, "all notes or reports of interviews with Shipping Point Inspection Inspectors conducted by Gary Van Sickle, California Tree Fruit Agreement field agent, relating to alleged California Tree Fruit Agreement 'color chip' maturity violations at Kash, Inc., in June, 1989."

79. Respondent admits that no documents exist, such as receipts, invoices, and vouchers relating to the purchase by Gary Van Sickle of a refrigerator and couch to be placed in the California Tree Fruit Agreement office in Reedley.

80. No documents exist, such as rental agreements, between the California Tree Fruit Agreement and the Tree Fruit Reserve relating to the rental of the refrigerator and couch by the California Tree Fruit Agreement from the Tree Fruit Reserve during the calendar year 1989.

81. Respondent admits that no documents exist, including, but not limited, to expense sheets, vouchers, cancelled checks, etc., relating to any and all expenses paid by the California Tree Fruit Agreement with regard to Mr. Jonathan Field's and/or Karen Jackson's (or any other California Tree Fruit Agreement personnel) attendances at the Tree Fruit Reserve corporate meetings (meals, travel, hotel rooms, etc.).

82. With respect to the Tree Fruit Reserve's activities, the Respondent knows of no other documents in existence, other than those adduced and stipulated to at the oral hearing.

83. No documents exist which show notices, issued to the tree fruit industry, announcing the "open and public" Management Services meetings prior to the Commodity Committee meetings each season, for every year from 1980 through the present.

The foregoing Findings of Fact consist, for the most part, of stipulations and/or stipulated responses, and vast amounts of documentary evidence which were stipulated into the record.

In addition to the facts derived from the consolidation with this proceeding of *Wileman/Kash I* by the Judicial Officer, the aforesaid stipulations, stipulated responses, testimony and Exhibits, and the record as a whole, support the following Findings of Fact numbered consecutively from Finding 83. Although in *Wileman/Kash I* the Judicial Officer regarded many like findings as "irrelevant or based on improper legal conclusions," and, the Respondent's position is that such facts are beyond the scope of this proceeding, I believe that such findings are relevant, material, and permissible in order to: (1) ascertain the extent of legal obligations, if any, of the Petitioners herein and to determine whether the Order obligations are in accordance with law; (2) to assist the Judicial Officer and a reviewing Federal Court; (3) to highlight those areas where the evidentiary facts reflect circumstances different from *Wileman/Kash I*, and, (4) to emphasize the thoroughness of the pleadings herein so as to avoid preclusion of issue because of failure to plead or to adduce evidence.

84. The administration, regulatory interpretations, regulatory implementation, actions, or non-actions of the Com-

mittee members and/or the Secretary, through his subordinates, have a direct, substantial, and ascertainable economic impact upon Petitioners.

85. In 1937, Congress enacted a revised Agricultural Marketing Agreement Act, 7 U.S.C § 601 *et seq.*). The Agricultural Marketing Agreement Act, in its declaration of policy, conferred upon the Secretary of Agriculture the authority to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce, to establish and maintain parity prices for farmers, to protect the interest of the consumer, to establish and maintain production research (added in 1947), marketing research, maintain standards of quality, maturity and grading, as well as establishing inspection requirements, to establish and maintain such marketing conditions as will provide, in the interests of producers and consumers, an orderly flow of commodities to the market through its normal marketing season (added in 1954), and to avoid unreasonable fluctuations in supplies and prices. (Title 7 U.S.C. § 602). Additionally, Congress specifically conferred upon the Secretary the power to " * * * establish and maintain such production research, marketing research, and development projects, * * * as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." 7 U.S.C. § 602(3).

To achieve that goal, the Agricultural Marketing Agreement Act permits the Secretary of Agriculture to issue Marketing Orders and Agreements applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product. (Title 7 U.S.C. § 609c). Section 608c of 7 U.S.C. directs the Secretary of Agricultural to issue Marketing Orders after notice and a hearing conducted whereby any interested party is given the opportunity to testify and after the Secretary finds that the order's terms "will tend to effectuate the declared

policy of the Act." 7 U.S.C. § 608c(4). Marketing Orders 916 and 917 (7 C.F.R. §§ 916 and 917) could not become effective until the respective Orders had been approved by two-thirds of the affected producers. 7 U.S.C. §§ 608c(8), (9). Amendments to Marketing Orders are promulgated in the same manner. 7 U.S.C. § 608c(17).

In 1954, Congress found that there was a need to provide for yet "greater stability in the products of agriculture." H.R. Rep. No. 1927, 83d Cong., 2d Sess. 1, *reprinted in* 1954 U.S. Code Cong. & Admin. News 3399. Congress concluded that the remedy should include a program "to protect the income of the farmers while comprehending the interests, needs and security of all segments of the economy and of all our people." *Id., reprinted at* 1954 U.S. Code Cong. & Admin. News 3403. Congress therefore adopted a bill which implemented a means to "encourage the expansion of markets and consumption at home and abroad." *Id.*

Toward that end, Congress amended the Agricultural Marketing Agreement Act authorizing the Secretary of Agriculture to promulgate Marketing Orders "[e]stablishing or providing for the establishment of marketing research and development projects designed to assist, improve or promote the marketing, distribution, and consumption of any such commodity or product, the *expense of such projects to be paid from funds collected pursuant to the marketing order.*" (Emphasis added). Agricultural Act of 1954, Pub. L. 83-690, § 401, 68 Stat. 906, 907 (1954), *codified* at 7 U.S.C. § 608c(6)(I). Authority to conduct "production research" and development projects designed to "assist, improve or promote . . . efficient production," was added in 1970. Pub. L. 91-292, 84 Stat. 333, June 25, 1970. Authority for projects providing "for any form of marketing promotion including paid advertising" for a specified commodity (cherries) was added in 1962. Pub. L. 87-703, 76 Stat. 632, Sept. 27, 1962. Plums and Nectarines were

included in this category in 1965. Pub. L. 89-330, 79 Stat. 1270, November 8, 1965. California-grown Peaches (and *only* California-grown Peaches) were included in this category in 1971. Pub. L. 92-120, 85 Stat. 340, August 13, 1971. In making such amendments, Congress granted the Secretary of Agriculture permission and discretion to impose, if he deemed it proper, "any form of marketing promotion including paid advertising for Nectarines and Plums." (Petitioners' Exhibit AB No. 18). At that time it was advised that the Department had not had any experience in the operation of an advertising program under marketing agreements and orders. Such authority was deemed proper if advertising were to benefit the growers and meet the objectives of the Act and that the inclusion of the stated commodities, "* * * would serve in providing experience now lacking in the [advertising] operation of Federal" Marketing Agreements and Orders.

86. When the Secretary promulgated the Nectarine Marketing Order in 1958, he made the following findings as to the Nectarine Administrative Committee, the agency that works with the Secretary in administering the order locally (23 Fed. Reg. 3007, 3010-12 (1958)):

> (b) It is desirable to establish an agency to administer the order locally under and pursuant to the act, as an aid to the Secretary in carrying out the declared policy of the act. The term "Nectarine Administrative Committee" is a proper identification of the agency and reflects the character thereof. It should be composed of 8 members. The members and alternates should be growers, or employees of growers. . . . Some growers of nectarines are corporations. These corporations and some of the larger individual growers have employees who are in complete charge of growing and marketing nectarines. Such employees would be qualified from the standpoint of knowledge and personal experience for service on the

> committee, and it would not be in the interest of the industry to deny them the opportunity to be nominated and to serve on the committee. . . . (23 Fed. Reg. 3010 (1958))

The committee should be given those specific powers which are set forth in section 8c(7)(C) of the Act. Such powers are necessary to enable an administrative agency of this character to function.

The committee's duties, as set forth in the order, are necessary for the discharge of its responsibilities. These duties are generally similar to those specified for administrative agencies under other programs of this character. It is intended that any activities undertaken by the members of the committee will be confined to those which reasonably are necessary for the committee to carry out its responsibilities as prescribed in the program. It should be recognized that these specified duties are not necessarily all inclusive, and that it may develop that there are other duties which the committee may need to perform. (23 Fed. Reg. 3011-12 (1958))

87. On April 5, and 6, 1965, a hearing was held in Fresno, California, pursuant to a notice published in 30 Fed. Reg. 3542 (March 17, 1965). Among the purposes was whether to add a new provision to Marketing Order 917 authorizing marketing research and development projects. A recommended decision was published at 30 Fed. Reg. 13063 (October 14, 1965) which recommended adding such a provision. As a result thereof the Secretary determined that the proposed amendment would "tend to effectuate the declared policy of the Act." 30 Fed. Reg. 15990 (December 23, 1965). This was subsequently ratified by referendum whereby at least two-thirds of the producers, who also produced at least two-thirds of the volume of Plums and Peaches produced in the production area, indicated that they favored the adoption of the aforesaid amendment to the

Order. 30 Fed. Reg. 15990, 15991 (December 23, 1965). Thus, section 917.39 (7 C.F.R. § 917.39) was adopted which stated:

> The committees, with the approval of the Secretary may establish or provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of fruit. The expense of such projects shall be paid from funds collected pursuant to § 917.37. (30 Fed. Reg. 15990, 15995)

Formal rulemaking conducted in 1971, resulted in amending section 917 to include authority for "production research" for Peaches and "production research" and "paid advertising" for Plums. (36 Fed. Reg. 5614 (March 25, 1971)) Formal rulemaking conducted in 1976 resulted in amending section 917.39 to include authority for paid advertising for Peaches. (41 Fed. Reg. 14375 (April 5, 1976)) Thus, section 917.39 (7 C.F.R. § 917.39) was amended to read as it does today:

> The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37. (41 Fed. Reg. 14375, 14382)

88. The Secretary concluded at 41 Fed. Reg. 14375, 14375, 14376-77 (April 5, 1976) that:

> The record shows that a wide consensus among the peach... industr[y] that promotional activities have been beneficial in increasing demand and should be continued.... The evidence indicates that provisions for paid

> advertising activities for peaches and pears and vesting authority therefor in the Peach and Pear Commodity Committees would place the peach and pear industries in a better position to advance the provisions of the Act and the Order.... Spot radio or TV commercials in the principal markets during peak movement periods have proved to be successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot have considerable influence in triggering retail promotions. The previous success of advertising efforts referred to here are in regards to advertising conducted under State Marketing Orders. *See,* 41 Fed Reg. 14376 (April 5, 1976).

89. Thus, the basic authority of the Secretary to implement the promotional programs, including advertising, were published at 36 Fed. Reg. 14381 (August 5, 1971) (Plums), 41 Fed. Reg. 14375 (Peaches) and 31 Fed. Reg. 6371 (May 19, 1966) (Nectarines).

90. The Petitioners do not challenge the *authority* of the Secretary to impose advertising programs on the tree fruit industry. He has had that authority as early as 1965, but he declined to exercise same until 1971. The Petitioners maintain that this is a discretionary function of the Secretary and, although discretionary, does have its limitations.

The Committees met on January 13, 1971 (36 Fed. Reg. 4055) and thereafter recommended to the Secretary that "generic" advertising programs for Nectarines and Plums be put into place. At that time, without considering available alternatives, including declining to implement any advertising programs whatsoever, at the request of the Commodity Committee a forced "generic" advertising program was created for Nectarines and Plums.

The Secretary published his intention to institute a "generic" advertising program for Nectarines and Plums in the Federal Register. (Petitioners' AB No. 19 (Plums), Petitioners' AB No. 20 (Nectarines)). At the time that he issued his proposed rulemaking, the Petitioners contend the Secretary allowed only a ten-day notice and comment period, which the Petitioners maintain was a violation of the Administrative Procedure Act. Petitioners contend that the failure of the Secretary to provide for an appropriate thirty-day notice and comment period nullifies the Secretary's rules. For every year since that time, the Secretary's regulations with respect to forced "generic" advertising programs, 7 C.F.R. sections 916.45 and 917.39 have been the "law."

91. Although 7 C.F.R. sections 916.45 and 917.39 set forth the authority for the Secretary to implement "all forms of advertising," these sections, however, do not make the implementation of an advertising program mandatory.

92. Although one might not be impressed with the extensiveness or persuasiveness of evidence in support of the need for advertising (i.e., a searching inquiry into the desirability thereof, the cost, the kind of advertising, the anticipated expenditure of funds, any limitations thereon, etc.) as set forth in the amendments to the Orders, nevertheless, there does exist some testimony and documentary evidence with respect to the proposed amendments which would include advertising. An example of such is set forth in the initial authorization for paid advertising contained in the hearing record as a result of a one day hearing in Fresno, California, on December 10, 1975. The person advocating the inclusion of paid advertising as it pertains to Peaches was Mr. Charles H. Sanderson, the Promotional Director of the California Tree Fruit Agreement, headquartered in Sacramento.

Mr. Sanderson's testimony, and, the questions with respect thereto, consumed approximately eleven pages of the

hearing transcript. Among other things noted by Mr. Sanderson was that advertising and promotion is an art, it is not a science and therefore doesn't lend itself to precise measurement. (Tr. 53 of that hearing). His testimony also sets forth the California Tree Fruit Agreement's promotional objectives. Other than his testimony in support of permitting advertising with respect to Peaches, through Mr. Sanderson, there was admitted into evidence the 1974 California Tree Fruit Agreement annual statistical report. (Exhibit 5 to that hearing record). Also, official notice was taken of the Federal Register (Volume 36) published May 12, 1971, pp. 8745-8738. (Exhibit 7 to that hearing record). Other than the general statements made by Mr. Sanderson and the aforesaid Exhibit 7 and the Federal Register officially noticed, there were no additional substantiating factual data with respect to the needs and objectives to be forthcoming from the authorizations of advertising for Peaches. [Note: This hearing also covered pears which are not involved in this proceeding.]

After the Secretary held the aforesaid public rulemaking hearing he issued proposed amendments to Order 917 and in response thereto he received comments from the California Citizen Action Group which, in letter dated March 8, 1976, indicated among other things:

> Our most strenuous basis for objection is that the hearings themselves were a shame. There was no adequate notice given to many persons and organizations known by proponents of the amendments and by the U.S.D.A. itself to be likely opponents of the proposal. As a result, only proponents of the amendments testified at the hearing and none of their testimony was subject to cross-examination on the public record. Thus, the hearing record on which the recommended decision is based is fatally defective and biased. The recommended decision itself reflects this critical bias by running rough shod over

the interest of consumers to protect the interest of Agribusiness.

* * * * *

The state marketing orders were managed by the same organization that proposed the amendments to the federal orders, namely the California Tree Fruit Agreement. The leadership of the California Tree Fruit Agreement knew full well that Citizen Action was not only an interested party at the Fresno proceedings but would also be a likely opponent of the proposal. Yet no effort was made to provide notice of the hearing.

In addition, the U.S.D.A.-AMS office in San Francisco that issued the press release announcing the hearings failed to send a copy of the release to either Citizen Action or to me personally. This is extremely peculiar given that both the organization and I are on the mailing list of that U.S.D.A. office and regularly receive their releases. Further, I am known by name as the director of an organization which has vigorously opposed supply control activities of marketing orders. Failure of the U.S.D.A.-AMS office to send notice of the hearing was at best a serious breakdown in their responsibility to provide notice to all interested persons and at worst part of an effort to avoid controversy at the hearing.

There are numerous examples of the inadequacies of the hearing record that had resulted from the failure to give proper notice and which have allowed gaping holes in the proposed amendment to go unnoticed. These include:

1. *Promotional Activity* * * *

* * * * *

C. Prohibitions of tying advertising which puts the government in the position of subsidizing promotion by private companies.

D. Prohibitions against the use of the promotional authority for political and public relations purposes.

* * * * *

In light of the obvious defects in the hearing record based on inadequate notice of the hearing, Citizen Action hereby formally requests that the recommended decision be held in abeyance, that the hearing be reopened, that certain witnesses in support of the amendments be made available for cross-examination and that evidence of opinion opposed to the amendments be heard.

Another comment to the recommended decision was received from Director L. T. Wallace, Department of Food and Agriculture, State of California. The Director was generally in agreement with the proposed recommended decision but did indicate some of the concerns with respect to the State of California:

* * * Developing of direct marketing programs may require regulations somewhat different from those commonly established for regular commercial shipments of fresh fruits both intra-and interstate. This would be especially pertinent with respect to grade, size, maturity, pack, and container issues applicable to local markets or under special shipping procedures. We hope that if regulations are made effective under the amended California Tree Fruit Agreement which are not compatible with this Department's programs for direct marketing, exceptions can and will be granted without undue delay.

It is noteworthy that Director Wallace reflected a sentiment that there was coamalgamation or blending of the State Marketing Orders, coming under the jurisdiction of California Tree Fruit Agreement, and the Federal Marketing Orders. For instance Director Wallace stated among other things in the aforesaid document: " * * * we state our concern primarily to encourage continuation of the coopera-

tion that we had experience in the past in the joint administration of Federal and State Marketing Orders."

After having considered the aforesaid exceptions to his recommended decision, the Secretary issued his final decision on April 5, 1976, 41 Fed. Reg. 14375. Among other things he found: "The evidence in the record of the hearings supports each proposal as set forth in the recommended decision."

It is interesting to note that with respect to the Order amending Order 917 [Docket No. AO-90-A6, signed on April 21, 1976, and effective April 29, 1976 (41 Fed. Reg. 17528, April 27, 1976)], the expense and assessment provisions set forth that the Committees were authorized to incur such expenses "as the Secretary finds are reasonable and are likely to be incurred" and that with respect to the *pro rata* share of the expenses to be incurred by each handler the same were to be amounts "which the Secretary finds are reasonable and are likely" to be incurred. Such statements, obviously, were not directed to situations where the expenses had already been incurred.

93. A hearing on whether there was a need for a Marketing Order relating to handling of Nectarines Grown in California, Docket No. OA-303, on March 19, 1958, and March 20, 1958, Mr. LeRoy Giannini appeared and testified in support of having an Order regulating Nectarines. He appeared as Chairman of the proponent Committee, namely the Nectarine Order Promulgation Committee. (Tr. 33 of that hearing record). Among other things to which he testified was the following: "The assessment rate for any fiscal period will be recommended by the committee, and it *should be approved by the Secretary each year prior to harvest.*" (Tr. 371 of that hearing). (Emphasis added).

Mr. Giannini confirmed that it was contemplated by the proponents of the Order that the Secretary *would approve*

and determine the initial assessment rate prior to the harvest season and should that prove to be faulty, then the Secretary was to be given special powers to make adjustments at or during or after the harvest season. In fact, Mr. Giannini testified, among other things: "If the assessment rate recommended by the committee and *fixed by the Secretary prior to harvest* is later found to be too low the committee should be authorized to recommend, and the Secretary to fix, a higher rate, even though some or all of the fruit has been shipped. Any such increase in rates should be applicable to all Nectarines shipped during the fiscal period. However, *the use of this authorization is considered by the proponents as an emergency measure not to be invoked* unless all other *methods of financing the season's operations are impractical.* Ordinarily, such a situation would be met by the use of reserve funds. (Tr. 372, 373 of that hearing record). (Emphasis added).

During other parts of his testimony Mr. Giannini joined others who testified as proponents of the proposed Order in seeking to assure that the Order procedures would be equitable to all concerned. In his testimony Mr. Giannini indicated that the proponents visualized the handling of assessment income, with a reserve permitted, to be in such fashion that it might never be necessary either to borrow money during the pre-harvest fiscal period or to return excess funds at the end of the fiscal period. This was, according to the proponents due to the fact that those who would undoubtedly pay the assessments, namely the growers, were engaged in a life time occupational pursuit; that there was not a frequent chance in the identify of the persons involved; and that it was known that the orchards were not frequently sold. Accordingly, Mr. Giannini indicated that the proponents believed that if the reserve fund tended to exceed the amount considered adequate, the assessment rate for the following year could be reduced; on the other hand if the reserve fund were to fall to a level

considered to low, the assessment rate could be slightly increased for the following year (Tr. 375, 376 of that hearing record)

Mr. Giannini in speaking for the proponents of the proposed Nectarine Order was concerned that it would be *inequitable to charge off purchases such as office equipment on a cash basis as opposed to depreciating same over a number of years.* In fact, his testimony was to the effect:

> For instance, in the first year it's going to require a purchase of office equipment, space, desk, typewriters and so forth, and on a cash basis where you spend and refund at the end of the year, those items are expensed off during that year, and that is an expense that would go to the producer of that particular year; whereas if its — if you would put this on a business like basis and you were able to depreciate out over a number of years, certainly he [grower] would be able to benefit also. (Tr. 388 of that hearing record)

Mr. Giannini testified that in general, it was the intent of the proponents, with regard to administrative matters, to insure that the administration of its affairs by the Committee should be conducted in accordance with sound and usual commercial business practices. (Tr. 391 of that hearing)

94. Petitioners Wileman Bros. & Elliott, Inc., and Kash, Inc. (sometimes referred to as "Wileman/Kash"), are regulated pursuant to the Nectarine, Plum and Peach Marketing Orders (7 C.F.R. § 916.1, *et seq.* (Nectarines), and 917.1, *et seq.* (Plums and Peaches)).

95. The Secretary of Agriculture pursuant to Title 7, U.S.C. § 610b, is authorized to establish Committees and associations of producers "for the more effective administration of functions vested in [the Secretary] by this chapter" (Committees are "agencies," pursuant to 7 U.S.C. § 608c(7)(C)).

96. Thus, the Secretary's decisions to implement the promotional programs, published at 36 Fed. Reg. 14381 (August 5, 1971) (Plums), 41 Fed. Reg. 14375 (Peaches) and 31 Fed. Reg. 6371, 31 Fed. Reg. 8176, 8177 (1966) (Nectarines), were the Secretary's decisions on the record evidence presented at the formal rulemaking hearings cited therein.

97. Wileman/Kash are required to pay assessments pursuant to Marketing Orders 7 C.F.R. §§ 916. 1, *et seq.* (Nectarines) and 7 C.F.R. §§ 917. 1, *et seq.* (Plums and Peaches). The assessment rates are, theoretically, recommended by the Nectarine Administrative Committee for Nectarines and by the Control Committee of the California Tree Fruit Agreement for Plums and Peaches. These Committees are expected to determine the rates by dividing anticipated expenses by estimated shipments of the particular commodity. The Committees are organized on a fiscal year basis which begins on March 1 of each year (7 C.F.R. § 916.7 and § 917.9). The Committees are required to develop and submit to the Secretary for approval, a budget of their anticipated expenses for each fiscal year (7 C.F.R. 916.31(c) and 917.35(f)). Each particular budget is expected to be discussed and established at Committee meetings generally held in May and then forwarded to the Secretary of Agriculture for review and adoption. However, Committee meetings are not a source of reliance for meaningful participation by those who may be affected thereby or who have an interest therein.

For instance, the nominations meetings, conducted by Mr. Field, are regarded as a real pain (Tr. 4725) and a "dog and pony" show (Tr. 4727) but it is there that the growers are entitled to nominate and elect those whom they wish to represent them on the Committees. (Tr. 4727). When there are research meetings and presentations on research projects a different group of people show up — such as more grow-

ers. (Tr. 4728). At the promotion meetings there are more sales people and shippers.

98. On or about May 5, 1988, the Nectarine Administrative Committee met and recommended an 18-cents per carton assessment against each 25-pound net weight container of Nectarines packed by each handler. The Nectarine Administrative Committee adopted a budget of $3,123,908 for the 1988 season, of which $867,000 was allocated for inspection ($.05 per carton), $89,153 for research projects, approximately $298,869 for salaries, employee benefits, travel, business meals, equipment, supplies, insurance, utilities, postage, paper, envelopes, special enforcement activity, credit insurance, etc. Other expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately $67,000. However, more than half of the Nectarine budget was to be directed to market development.

99. The Nectarine Administrative Committee approved a 1988 Nectarine Market Development Budget of $1,801,886, which included: $858,146 for television advertising; $306,390 for radio advertising; $114,750 for retail advertising incentives, plus another $112,000 for field staff activities relating to the same; $80,000 for Canadian advertising: $27,200 for trade communications; $22,500 for retail projects; $35,600 for point of sale materials; $59,100 for publicity, education activities; $32,500 for food service activities; $22,500 for promotion expense; $6,950 for Hispanic promotion; and, $13,250 for advertising research. This combined total amounted to approximately $.10 per 25-pound net weight container towards the "generic" advertising budget.

100. On or about May 4, 1988, the Plum Commodity Committee met and recommended a 19-cents per container assessment against each 28 pound net weight carton of Plums packed by each handler. The Control Committee

adopted a budget for the Plum Commodity Committee of $3,510,878 for the 1988 season, of which $1,085,960 was allocated for inspection ($.06 per carton), $80,052 for research projects, approximately $373,407 for salaries, employee benefits, travel, auto operation, equipment supplies, insurance, utilities, postage, paper, envelopes, special enforcement activity, credit insurance, etc. The other Committee expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately $87,350. However, more than half of the Plum budget was to be directed to market development.

101. The Plum Committee approved the Plum Market Development Budget of $1,971,459 which included: $850,719 to television advertising; $306,390 for radio advertising; $189,750 for retail advertising incentives, $112,000 for field staff activities relating to the same; $27,200 for trade communications; $22,500 for retail projects; $35,600 for point of sale materials; $59,100 publicity, education activities; $32,500 for food service activities; $22,500 for promotion expense; and, $6,950 for Hispanic promotion. This combined total amounted to approximately $.10 per 28-pound net weight container towards the "generic" advertising budget.

102. On or about May 4, 1988, the Peach Commodity Committee met and recommended an 18-cents per carton assessment against each container of Peaches packed by each handler. The Control Committee adopted a budget for the Peach Commodity Committee of $2,562,089 for the 1988 season, only $896,000 of which was for inspection ($.06 per carton), $55,402 for research projects, and approximately $330,352 for salaries, employee benefits, travel, auto operation, equipment supplies, insurance, utilities, postage. papers, envelopes, special enforcement activity, credit insurance, etc. Other Committee expenses included rent for their offices, telephones and other miscellaneous audit expenses

amounting to approximately $52,350. However, more than half of the Peach budget was to be directed to market development.

103. The Peach Commodity Committee approved the Peach Market Development Budget of $1,280,435, which included: $456,135 to television advertising; $220,000 for radio advertising; $98,000 for retail advertising incentives, $96,000 for field staff activities relating to the same; $80,000 for Canadian advertising; $27,200 for trade communications; $22,500 for retail projects; $25,300 for point of sale materials; $59,100 for publicity, education activities; $32,500 for food service activities; $22,500 for promotional expense; $6,950 for Hispanic promotion: and $13,250 for advertising research. This combined total amounted to approximately $.09 per container towards the "generic" advertising budget.

104. The term "Market Development" as used by the Committees, includes field staff activities, retail advertising incentives, trade communications, retail projects, point of sale materials, publicity, education activities, food service activities, TV and radio production, television and radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion and miscellaneous related expenses.

105. Thus, over $4,800,000 was being directed by the Nectarine, Plum and Peach Committees to conduct "generic" advertising, while approximately $4,378,000 was being used for actual Committee expenses, including research projects.

106. Subsequent to the filing of a Petition in a prior 7 U.S.C. § 608c(15)(A) proceeding (AMA Docket Nos. 916-1, 916-2, 917-2, 917-3), the Secretary of Agriculture, on April 8, 1988, issued for the first time, a proposed rule to incorporate the term "well-matured." This proposed rule

intended, with respect to Plums, to regulate out smaller-sized Plums, to incorporate a procedure for requesting variances from the proposed "well-matured" maturity standard which was to be determined by the use of color chips, which were to be applied by the Federal-State Inspection Service. (53 Fed. Reg. 11669); Petitioners' Appendix to Brief (hereafter "A.B." No. 2). This proposed rule provided that interested persons could file comments through *April 25, 1988*. Subsequently, the time period for filing written comments on the proposed rule was extended to May 2, 1988 (53 Fed. Reg. 13413; Petitioners' "A.B." No. 3).

107. On April 18, 1988, the Secretary issued proposed rules (virtually identical to those above-mentioned relating to Plums) with respect to eliminating smaller-sized Nectarines and Peaches, incorporating a variance request procedure and implementing the "well-matured" maturity standard to be determined by the use of color chips, which were to be applied by the Federal-State Inspection Service. (53 Fed. Reg. 12687 (Nectarines); 53 Fed. Reg. 12691 (Peaches); Petitioners' "A.B." Nos. 4 and 5, respectively). The proposed rule provided that interested persons could file comments through May 3, 1988. In his proposed rule for Nectarines, the Secretary set forth the following reasons for not providing a 30-day notice and comment period as required by the Administrative Procedure Act:

> A comment period of less than 30 days is deemed appropriate for this proposal. The harvest and shipment of the 1988 nectarine crop is expected to *start April 22, 1988*, and growers and handlers should be given as much notice as possible of any changes, if adopted to permit the industry to plan accordingly. Moreover, the Department already has received fetters in opposition to the proposed nectarine size changes indicating the industry is aware of

the Committee's recommendation. (53 Fed. Reg. 12690).[2]

108. On May 27, 1988, the Secretary issued Interim Final Rules, purportedly binding on Wileman/Kash, which substantially altered the maturity determinations and the procedure for requesting variances from the new maturity determinations. The Interim Final rules, as published, were substantially different than those set forth in the proposed rules issued approximately five weeks earlier. In said Interim Final Rules, the Secretary rejected the Plum Committee's proposal to eliminate small-sized Plums, but at the same time, the Secretary adopted the respective Committee's proposals to eliminate small-sized Nectarines and Peaches (53 Fed. Reg. 19218 (Plums); 53 Fed. Reg. 19226 (Nectarines); 53 Fed. Reg. 19234 (Peaches); Petitioners' "A.B." Nos. 6, 7 and 8, respectively).

109. Wileman/Kash, through their attorney, submitted comments in opposition to the proposed rule modifications regarding Plums, Nectarines and Peaches. Subsequent to the issuance of the Interim Final Rules, Wileman/Kash, through their attorney, submitted comments in opposition to the Interim Final Rules as published.

110. Consequently, on or about June 3, 1988, Wileman/Kash filed the present 7 U.S.C. § 608c(15)(A) Petition to modify, terminate or to be granted an exemption from various provisions of the Nectarine, Plum and Peach Marketing Orders and any obligations imposed in connection therewith that are not in accordance with law.

111. In conjunction with the filing of the 7 U.S.C. § 608c(15)(A) Petition, Wileman/Kash filed an Application for Interim Relief, pursuant to the Rules of Practice

[2] The explanation given by the Secretary (except for the fruit harvest start-up dates) for his failure to comply with the requirements of the Administrative Procedure Act and his own departmental policy read identically, with respect to Plums and Peaches, as the above-cited statement regarding Nectarines.

Governing Administrative Petition Proceedings, Title 7 C.F.R. § 900.70.

The United States Department of Agriculture responded and opposed the Application for Interim Relief, claiming that the Secretary had no authority to grant interim relief, to which Wileman/Kash responded. The Judicial Officer agreed with the position of the United States Department of Agriculture, indicating that jurisdiction did not exist to grant interim relief. The Judicial Officer, on July 8, 1988, signed an order denying Wileman/Kash's Application for Interim Relief. Wileman/Kash, on or about July 29, 1988, filed a Motion for Reconsideration of the Order Denying Interim Relief, which Motion was denied on August 3, 1988.

112. On June 16, 1988, for the first time this decade, the Secretary issued a proposed rule regarding the estimated assessment rates. This rule was published in the Federal Register (53 Fed. Reg. 23243) on June 21, 1988 (Petitioners' "A.B" No. 9). The proposed rule provided that interested persons could file comments through July 1, 1988. On July 19, 1988, the Secretary issued a final rule with respect to the assessment rates (53 Fed. Reg. 27151; Petitioners' "A.B" No. 10). In his final rules the Secretary set forth the following reasons for not providing a 30-day notice and comment period as required by the Secretary's own "Departmental Regulation," 1512-1, and by the Administrative Procedure Act:

> The budgets are formulated and discussed in public meetings. Thus all directly affected persons have an opportunity to participate and provide input. . . .
>
> Approval of the expenses, assessment rates, and operating reserves should be expedited because the committees need to have sufficient finds to pay their expenses which are incurred on a continuous basis. In addition, handlers are aware of this action which was recommended by the

committees at public meetings. Therefore, the Secretary also finds that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register. (53 Fed. Reg. 27152).

The Secretary further stated:

While this section will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the marketing orders. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities. (53 Fed. Red. 23244, 27152).

113. A significant portion of the monies being levied against Wileman/Kash are being utilized by the various Committees and the California Tree Fruit Agreement for research projects to which Wileman/Kash do not subscribe. These research projects include paying individuals and firms for writing reports ostensibly showing that "generic" advertising is beneficial to the industry.

114. Only 5-to-6 cents per container is being levied against Wileman/Kash in assessments to provide for inspection services to inspect the fruit. Whereas, approximately 10 cents is levied per container to generically advertise fruit. Wileman/Kash are vehemently opposed to spending their money to advertise other handlers' fruits.

115. As a result, Wileman/Kash paid their 1987 assessments into an attorney client trust fund account, held by their attorney of record. The Department of Agriculture then threatened to bring an action to recover the 1987 assessments.

116. Wileman/Kash through their counsel, attempted, on several occasions, to negotiate a settlement of the

Marketing Order issues in dispute in order to avoid suit being filed. Wileman/Kash offered various alternatives: (1) a stipulation that the money would be returned in the event Wileman/Kash prevailed in the administrative Petition proceeding; (2) the assessment funds would be deposited with the Secretary of Agriculture pending the outcome of the administrative Petition proceeding, to be returned to Wileman/Kash if Wileman/Kash prevails; and (3) maintain the assessments in an interest bearing client trust account with or without the Department of Agriculture (at its option) being cosignatory to said client trust fund account. The Department of Agriculture refused all proffered options.

117. On October 28, 1988, the United States Department of Agriculture, through the U.S. Attorney's Office, filed a collection action for the 1987 and 1988 assessments levied against Wileman/Kash. Subsequently, a First Amended Complaint was filed (Petitioners' "A.B." No. 11), to which Wileman/Kash filed an Answer (Petitioners' "A.B." No. 12), a Counter-Claim, a Third Party Complaint against Richard Lyng, who was, at that time, the Secretary of Agriculture and a Cross-Motion for a Stay of the Government's First Amended Complaint (Petitioners "A.B." No. 13), along with the Declaration of Thomas E. Campagne, in Support of the Motion for a Stay (Petitioners' "A.B." No. 14).

118. On January 31, 1989, counsel for Wileman/Kash, Thomas E. Campagne, and counsel for Plaintiff in the assessment collection action, U.S. Attorney Mark E. Cullers, attended a Status Conference before U.S. Magistrate Allan D. Christensen. At that time Mr. Cullers requested that the Status Conference be continued until April 25, 1989, to allow the Ninth Circuit Court of Appeals to rule on related issues, pending before that Court, regarding the instant parties. Mr. Cullers indicated the Ninth Circuit

decision might be dispositive of the collection action. However, rather than waiting for that decision to be issued, Mr. Cullen wrote and filed a Motion for Summary Judgment.

119. On June 12, 1989, argument was scheduled before the Federal Judge for the Eastern District of California, the Honorable Edward Dean Price. Judge Price limited argument solely to Wileman/Kash's Motion to Stay the First Amended Complaint (the collection action) (Petitioners' "A.B." No. 13).[3] In his Decision, issued July 6, 1989, Judge Price ordered the United States Department of Agriculture's assessment collection action "stayed until such time as the validity of the marketing orders may be finally determined." Judge Price's ruling encompassed not only the 1987 and 1988 assessments, but all future assessments levied against Wileman/Kash and such assessments were ordered placed in Wileman/Kash's attorney client trust account pending the final determination of the validity of the Marketing Orders (Petitioners' "A.B." No. 16). The Administrative Law Judge is without current knowledge of the attorney-client trust fund administered by the Court.

120. During the course of the summer, 1989, Wileman/Kash became aware of the existence of a "private" corporation entitled the Tree Fruit Reserve. Any prior awareness of the name Tree Fruit Reserve certainly did not encompass what was brought out at the oral hearing and it was only through the issuance of Subpoena Duces Tecum did such data became available. Under date of July 7, 1989, Jonathan W. Field (Manager of the California Tree Fruit Agreement), as the *Secretary-Treasurer of the Tree Fruit Reserve*, issued a letter to a segment of the tree fruit industry eliciting support for the Law firm of Heron, Burchette,

[3]The transcript of the Motion's hearing is attached to Petitioners' Post Hearing Brief as "A.B." No. 15.

Ruckert & Rothwell to intervene on behalf of the United States Department of Agriculture before the Judicial Officer in an attempt to overturn the decision of Administrative Law Judge Dorothea A. Baker in the Wileman Bros. & Elliott, Inc. and Kash, Inc., 1987—7 U.S.C. § 608c(15)(A) Petition Hearing (AMA Docket Nos. F&V 916-1, 916-2, 917-2, 917-3). In that letter, Mr. Field made reference to the Tree Fruit Reserve as being "a non-profit corporation established in 1957 to represent the tree fruit industry in these matters, [which] along with many industry leaders is proceeding to intervene on behalf of the industry." (Attachment to Petitioners' Post Hearing Brief as "A.B." No. 17).

121. After becoming aware of the existence of the Tree Fruit Reserve, Wileman/Kash made efforts to determine the composition of and the purpose for the existence of the Tree Fruit Reserve. What Wileman/Kash found, and what was proved at the hearing, is that the Tree Fruit Reserve is the "alter-ego" of the Commodity Committees, and the California Tree Fruit Agreement. The Agricultural Marketing Agreement Act, the Marketing Orders and various United States Department of Agriculture guidelines strictly regulate how assessment monies, mandatorily collected from handlers, may be spent by Commodity Committees, and further, strictly regulate the subjects upon which such expenditures may be made.

122. The Tree Fruit Reserve, acting with the identical Board that controls the California Tree Fruit Agreement, has expended, and continues to expend amounts derived from handler-assessment funds mostly in the form of "rents," in a manner and on projects strictly prohibited to the Secretary of Agriculture. Wileman/Kash proved that the Officers and members of the Tree Fruit Reserve are also the Chairmen and members of the various Tree Fruit Committees. Further, the Tree Fruit Reserve owns the

buildings, automobiles, and the office equipment used by the California Tree Fruit Agreement. The California Tree Fruit Agreement then rents their office space, their automobiles and their office equipment, at rates which can be considered excessive from the Tree Fruit Reserve.

123. The Tree Fruit Reserve was incorporated in 1957, as a non-profit California corporation, which obtained tax exempt status from the Internal Revenue Service as a 501(c)(6) organization. Its initial funding came from excess assessments not needed by the Committees at that time, to further promote the legitimate purposes of the Marketing Orders and the Agricultural Marketing Agreement Act.

124. In 1957, refunds could have been obtained by handlers with respect to excess assessments and some handlers did receive assessment refunds. However, those excess assessments which were not refunded became the "seed" money for the formation of the Tree Fruit Reserve, which was accomplished through a Tree Fruit Reserve Trust Account.

The Respondent's contention is that the "seed money" did not come from excess assessments because:

> "* * * The Act and the order as it was written at that time provided they had to make refunds to people if, you know, they didn't spend the money during the year. So everybody was offered a refund and if they chose to send it somewhere else, its their business. (Tr. 2715)."

This contention is fallacious because such "seed" money came from tax deductible amounts.

125. The purpose of the Tree Fruit Reserve's existence is to engage in acts which are illegal and beyond the authority for the Secretary of Agriculture to engage in. The collection and expenditure of assessments are subject to the jurisdiction, revision and approval of the Secretary of Agriculture.

The Tree Fruit Reserve has been, and is being, used to divert assessment monies, resulting in higher handler assessments than would otherwise be required to achieve the legal and legitimate objectives of the Agricultural Marketing Agreement Act and the Marketing Orders. This is not a circumstance where one is unduly scrutinizing every penny spent for rents as well as the other activities of the Committees. The Tree Fruit Reserve was established, and, admittedly, continues to operate, in a manner to avoid proscriptions, limitations and restrictions placed upon the Secretary of Agriculture, the Commodity Committees and their agents by the Agricultural Marketing Agreement Act and the provisions of the Orders.

The record is replete with acknowledgements and admissions of the role played by Mr. Kurt Kimmel and the Tree Fruit Reserve and although it did concern Mr. Kimmel, the Agricultural Marketing Service representative, that the Tree Fruit Reserve was being used as a vehicle "to avoid prohibition on the expenditure of assessments by commodity committees." (Tr. 2711), nevertheless, he acknowledged the Tree Fruit Reserve corporation as a vehicle to accomplish acts which are illegal for the Secretary or his appointed Committeemen to do:

> Because *they can do things* as Tree Fruit Reserve trustees or executive committee members *that they cannot do as California Tree Fruit Agreement chairmen.* (Tr. 2700. 2701). (Emphasis added).

This included spending money on private lawyers, and spending money on lobbying. (Tr. 2701). The Tree Fruit Reserve acquired useable assets which had been fully depreciated ("expensed") by the California Tree Fruit Agreement at "salvage" value (or $1.00) which it subsequently rented back to the California Tree Fruit Agreement. (Tr. 2728). By making contributions through the Food and

Fiber alliance, the Tree Fruit Reserve obtained a seat on the Board of Food and Fiber. (Tr. 3478, 3479).

The role played by the Tree Fruit Reserve was no secret to the Department of Agriculture, but may not, and probably wasn't known to growers and handlers. (Tr. 2699, 2711). There was a 1988 meeting where the Chief of the Marketing Order Administrative Branch from Washington, D.C., expressed Agricultural Marketing Service's concern with the relationship between the Tree Fruit Reserve and the Committees and the Chairmen which meeting was held in the California Tree Fruit Agreement's office. (Tr. 2697). At that meeting the Washington representative was concerned that the California Tree Fruit Agreement was doing certain services for the Tree Fruit Reserve for which it was not receiving any spelled out remuneration. (Tr. 2703, 2704).

126. Because the Tree Fruit Reserve was being used as a subterfuge to accomplish ends not available to the Secretary of Agriculture, an examination of its operations as they may pertain to matters of the present case, casts substantial doubt as to whether it should be regarded as a private, tax exempt, non-profit corporation at all. If so, piercing of the corporate veil, for the purposes of this proceeding, is warranted.

127. The Petitioners have noted, and the Respondent has not disagreed (although it has not directly addressed such facts) that the California Corporations Code requires that the Bylaws shall set forth the number of Directors of a corporation unless such provision is contained within its Articles of Incorporation. The Bylaws may not change the number of Directors other than through an amendment to the Bylaws adopted by the membership of the corporation. The Bylaws may not conflict with the Articles of Incorporation (California Corporations Code §§ 7151(a), (b) and (c)).

The Bylaws of the Tree Fruit Reserve Corporation directly conflict with its Articles of Incorporation. The Bylaws specify that the corporation shall have 25 Directors, comprised of 12 tree fruit handlers/shippers and 13 tree fruit growers. However, the Articles of Incorporation, in direct conflict with the Bylaws, state that "the number of Directors shall be three." (Exh. No. 30). No reasonable explanation has ever been provided to explain this glaring discrepancy.

Regardless of the reasons for the discrepancy in the number of authorized Directors, there is no question that drafting the Bylaws in conflict with the Articles of Incorporation fails to satisfy the due care requirements mandated by the California Corporations Code.

128. Added to this discrepancy is the Tree Fruit Reserve's complete failure to comply with California corporate law. The California Corporations Code at § 7220(a) states that: "Directors shall be elected for such terms . . . as are fixed by the Articles or Bylaws."

The Bylaws of the Tree Fruit Reserve specify that the terms of office for each Director *shall* be one year and that the Directors *shall* be nominated and elected by the members at the annual meeting. The Tree Fruit Reserve has failed to conduct an annual meeting for the last ten years. In fact, the President of the Tree Fruit Reserve, Mr. Al Peterson, has no recollection of ever having conducted either an annual meeting of members and/or a meeting of the full Board of Directors. (Tr. 1538). Mr. Peterson stated that by virtue of his having been elected to the Control Committee of the California Tree Fruit Agreement, he was automatically placed on the Board of Directors of the Tree Fruit Reserve, he was not elected. Everyone who is a member of the Control Committee of the California Tree Fruit Agreement automatically sits in the dual capacity as a Director of the Tree Fruit Reserve. (Tr. 1535).

129. "A regular meeting of members *shall* be held on a date and time, and with the frequency stated or fixed in accordance with the Bylaws . . . ." (California Corporations Code § 7510(b)). The Bylaws of the Tree Fruit Reserve specify that meetings will be held annually. As stated above, the Tree Fruit Reserve has failed for the last decade to comply with the requirement that an annual meeting of the members of the corporation be conducted.

130. Shortly before the oral hearing herein, Mr. Jonathan Field, as the Secretary-Treasurer of the Tree Fruit Reserve, on January 4, 1990, sent a letter to the alleged Directors of the Tree Fruit Reserve which stated, among other things:

> "The Law Firm of Thomas E. Campagne, which represents Wileman Bros. & Elliott and Kash, Inc. in their lawsuits and petition involving the California Tree Fruit Agreement, has recently directed their legal attack on the industry and Marketing Orders by attacking Tree Fruit Reserve. Campagne has also alleged that the Tree Fruit Reserve has been the body which has made quality decisions rather than Tree Fruit Agreement. They have alleged that Tree Fruit Reserve has laundered assessment money to be spent on actions/activities contrary to the industry and the Marketing Act.
>
> *It has been discovered that the Executive Committee of Tree Fruit Reserve has been making decisions on behalf of the Board of Directors* under their authority as outlined in the bylaws in recent years. *It is necessary that the present Board* of Directors of Tree Fruit Reserve convene to review and possibly ratify the decisions of the Executive Committee. For your preparation and review, a listing of the recommendations of the Executive committee is attached along with a summary of the Tree Fruit Reserve activities from 1957 to the present." (Exh. 169(A)). (Emphasis added).

Mr. Field's letter had attached a synopsis of the history and background of the Tree Fruit Reserve. This was to inform the letter's recipients, who might not have known that they were Directors of the Tree Fruit Reserve, just what the Tree Fruit Reserve was. The letter called for a "very important meeting" on January 17, 1990, as "It *is necessary to bring the corporate records of Tree Fruit Reserve into compliance with technical corporate procedure.*" (Emphasis added). As *Wileman/Kash* alleged, there is evidence that the industry was not aware of the operation of the Tree Fruit Reserve and its relationship to the California Tree Fruit Agreement. This letter confirms that fact and seems to indicate that not all the "Directors" of the Tree Fruit Reserve were aware of its existence. Mr. Field's "history and background" sets forth the formation and the purpose for the existence of the Tree Fruit Reserve. Mr. Field's request for an emergency meeting was to ratify previously *ultra vires* conduct. (Exh. No. 169(A)).

131. Subsequent to the issuance of Mr. Field's letters, on January 17, 1990, a meeting of the Board of Directors of the Tree Fruit Reserve was conducted at the Red Lion Inn, in Sacramento, California. Eleven persons designated as Directors were in attendance and three others attended pursuant to telephone tie-in. Also in attendance at this meeting was Mr. Bill Thomas and Mr. Mike LeLouis, attorneys for the Law Firm of Heron, Burchette, Ruckert & Rothwell. Mr. Thomas explained to those present that the activities of the Tree Fruit Reserve were presently being scrutinized. He advised that Administrative Law Judge Dorothea A. Baker had ordered production of the records, including corporate records of the Tree Fruit Reserve to include the Board Minutes. Mr. Thomas went on to explain that:

> "In assembling the documents [pursuant to Judge Baker's Order], it became apparent that *attention to some of the corporate details had not been fully satisfied.* Prior

to 1982, there were annual Board meetings as well as Executive Committee meetings. It had been a practice consistent with the Bylaws that the corporation would be generally run by the Executive Committee. In the past, CTFA decisions were made by the Control Committee and many of the same members of the Control Committee were on the Reserve Board of Directors. Because of this, it was convenient to hold meetings for both on the same day. By 1982, the operation of CTFA was delegated by the Control Committee to the Management Services Committee which represented all programs managed by CTFA. The Tree Fruit Reserve Bylaws fully empower the Executive Committee to make corporate decisions and no actions have been taken or approved in an improper manner. He said the only problem has been the routine corporate meeting requirements." (Exh. No. 169(B)).

132. The Tree Fruit Reserve did not have any members, and the President of that corporation was unaware how one would become a member.

133. Although the validity of the Tree Fruit Reserve's tax exempt status is not an issue herein, certain factors became pertinent as to the *bona fides* of the Tree Fruit Reserve. The evidence shows that the Tree Fruit Reserve filed annual IRS Forms 990. (Tax Return Of An Organization Exempt From Income Tax). Mrs. Dawn Rau, a CPA with Grant Bennett Associates in Sacramento, testified that she has been personally involved in the preparation of the tax returns and the yearly financial audits of the California Tree Fruit Agreement, the Nectarine Committee, the Plum Committee, the Peach Committee and the Tree Fruit Reserve, since 1983. (Tr. 59-62). Mrs. Rau testified that she has the responsibility of verifying, as part of the audit, that the corporate responsibilities of the corporation are met, Minutes are kept, etc. In her opinion, the records of the

organizations have been normally and properly maintained (Tr. 63-65).

Although Respondent argues that the Tree Fruit Reserve is a private corporation which is unrelated to the Commodity Committees and/or the California Tree Fruit Agreement, Mrs. Rau has specifically found, in her preparation of the financial statements on behalf of the Tree Fruit Reserve that: "The Tree Fruit Reserve and the California Tree Agreement are affiliated non-profit organizations; the Tree Fruit Reserve receives all of its operational revenue from the CTFA in the form of rent on buildings, automobiles, office equipment . . . . These amounts arise from related party transactions with the CTFA" (Ex. No. 204).

134. In spite of her acknowledgement, in the Tree Fruit Reserve financial statement, of the interrelationship between the Tree Fruit Reserve and the California Tree Fruit Agreement, the evidence does not show that Mrs. Rau provided this same information to the Internal Revenue Service. For example, with respect to page 4 of the IRS Form 990, submitted on behalf of the Tree Fruit Reserve, several discrepancies exist which to date go unexplained. Although Mrs. Rau states that ". . . The Tree Fruit Reserve and the California Tree Fruit Agreement are affiliated non-profit organizations," she denies on the IRS Form 990 that the Tree Fruit Reserve is interrelated with any other organization. (Ex. Nos. 272-296).

135. Although on the financial statement of the Tree Fruit Reserve for the fiscal year ending February 28, 1989, there is acknowledged a contribution to the California Grape and Tree Fruit League to support the Alliance for Food and Fiber to counter pesticide legislation (Exhibit No. 204), Mrs. Rau denies on the IRS Form 990 that any amounts were spent in attempts to influence public opinion about legislative matters or referendums. (Ex. No. 272). This directly contradicts the entry in the financial statement.

136. Although the 1988-1989 financial statement of the Tree Fruit Reserve, as prepared by Mrs. Rau, sets forth $5,437.00 as unrelated income generated during the 1988-89 fiscal year (Exhibit 204), Mrs. Rau denies on the IRS Form 990 that the Tree Fruit Reserve generated in excess of $1,000.00 in unrelated income during this time frame. (Ex. No. 272).

137. Although it was testified that the computer and press purchased by the California Tree Fruit Agreement in 1986 was transferred to the Tree Fruit Reserve for little or no remuneration in 1987 (Tr. 3463), the IRS Form 990s prepared by Mrs. Rau, fail to reflect that the organization received donated services or the use of materials, equipment or facilities at no charge or substantially less than fair rental value. (Ex. Nos. 272-275).

In addition, the Tree Fruit Reserve was regarded as an instrument for tax diminishment:

> * * * Mr. Rasmussen confirmed that it was the industry's intention to provide Mr. Geller with the trip, not a tax liability, and that *Tree Fruit Reserve* should reimburse for any additional expense created. (Emphasis added). (Exh. 157, p. 3).

The manner of handling the Tree Fruit Reserve's "reimbursement" to Mr. Geller, is not as important as the fact that Tree Fruit Reserve was being used for personal, private considerations. When it would be regarded as inappropriate for the California Tree Fruit Agreement to fund a trip to Washington, it "* * * could be funded through Tree Fruit Reserve. * * * (Ex. 157, p. 9).

138. As for the fiscal years ended February 28, 1988 and 1989, the Tree Fruit Reserve Balance Sheets reflect Insurance coverage (fire and extended) on its building of $378,000; $83,000 coverage on its business property and $36,000 coverage on other business assets. Said Balance

Sheets (Exh. 214) further reveal that its building and land were carried on its books as:

	1988	1989
Building	$117,766	$121,161
Land	16,769	16,769

with a reserve for depreciation of $149,023 in 1988 and $165,564 in 1989. The accumulated surplus was:

1988: $270,802
1989: $238,338

139. Another instance of where the "unity" between the California Tree Fruit Agreement and Tree Fruit Reserve tended to enhance handler assessments is that of the "ripening bowl," a plastic bowl into which the consumer places fruit and the ripening process is accelerated by the trapped ethylene gas emitted from the fruit. This was profitably marketed through the California Tree Fruit Agreement since 1978, but the profits generated therefrom now go to the Tree Fruit Reserve.

Exhibits Nos. 129 through 156 chart the progress and profitability of the ripening bowl (being the Minutes of the Management Services Committee). At the November 12, 1985, Management Services meeting, Mr. Sanderson, the then manager of California Tree Fruit Agreement mentions that the industry was becoming bored with the ripening bowl; sales were down; it was therefore decided to discontinue production of the bowls. (Tr. 4707-4708). Exhibit 156 reveals that in the 6-7 year period, the bowls had generated in excess of $300,000.

140. A review of the joint Minutes of the Management Services Committee and the Executive Committee of the Tree Fruit Reserve, dated December 7, 1987 (Exhibit No. 163), shows that, without discussion, the California Tree Fruit Agreement casually referenced that it was considering re-introducing the ripening bowl. Then, at the very

next meeting, on May 3, 1988, the ripening bowl was voted back into existence. However, this time not by the California Tree Fruit Agreement, instead, the Tree Fruit Reserve would thereafter market the bowl. (Ex. No. 164).

141. In a separate set of Minutes, also dated May 3, 1988, which references a meeting of the Executive Committee of the Tree Fruit Reserve, Mr. Jonathan Field discusses the ripening bowl. The May 3, 1988, meetings of Management Services and the Executive Committee of the Tree Fruit Reserve, are in actuality one meeting that is reflected in separate Minutes. This was done as a result of the United States Department of Agriculture indicating that there should be more separation between the entities. So, rather than have separate meetings, they merely created separate minutes of the same meeting. Mr. Jonathan Field stated that the California Tree Fruit Agreement did not desire to re-enter the ripening bowl business and suggested that the Tree Fruit Reserve handle the sale of the bowl, as there was reduced consumer interest in the ripening bowl. (Ex. No. 164A).

Jonathan Field in his testimony, sought to justify the transfer of the ripening bowl from the California Tree Fruit Agreement to the Tree Fruit Reserve because of the amount of staff time spent by the California Tree Fruit Agreement which wasn't reflected in its "profit" although this was not documented. In essence he stated that there was a minimal profit, if any, made on the ripening bowls. (Tr. 4708-4709). Mr. Field testified that all remaining inventory and/or supplies relating to the ripening bowl were purchased by the Tree Fruit Reserve from the California Tree Fruit Agreement. He stated that there wasn't very much because the California Tree Fruit Agreement had been out of the ripening bowl business "for so many years" (one year). (Tr. 4709-4710). A review of the Tree Fruit Reserve's Summary of Income and Expenses attached to the Minutes of the

Executive Committee of the Tree Fruit Reserve, dated May 2, 1989 (Ex. No. 167), points out that ripening bowl income (before estimated expenses of $112,000) for the first year after its reintroduction exceeded One Hundred Twenty-Five Thousand Dollars ($125,000).

142. Respondent's contention that the Tree Fruit Reserve "purchased" the rights to the ripening bowl from the California Tree Fruit Agreement cannot be substantiated. Neither the financial statements of the California Tree Fruit Agreement nor those of the Tree Fruit Reserve show any transfer of funds from the Tree Fruit Reserve to the California Tree Fruit Agreement for materials, product or the right to market the product.

143. The wishes of the California Tree Fruit Agreement could be carried out anonymously through the use of the Tree Fruit Reserve, as can be discerned from Minutes such as contained in Exhibit 157 being "MANAGEMENT SERVICES COMMITTEE, MINUTES EXECUTIVE COMMITTEE, TREE FRUIT RESERVE:"

* * * * *

* * * The All Programs Statement includes estimates for all expenses for the fiscal year ending February 28, all payments by CTFA to Tree Fruit Reserve including equipment and rent and payment in full of all Shipping Point Inspection charges for the 1985 season. * * *

* * * * *

Tree Fruit Reserve

Mr. Sanderson then reviewed the *Tree Fruit Reserve Income Statement* (copy attached) projected to February 28, 1986. *Cash on hand March 1, 1985, was $138,519.27.* During the year income was received for

rent, interest, sale of furniture, rent on furniture and equipment, and usage of company cars in the amount of $58,130.02. Expenses included $4,868.08 to build new office space, two new cars at $20,466.06, the premium on the bankruptcy insurance at $11,225 and additional new office furniture purchased for new employees Deborah Beall and Ray Pisciotta. Total expenditures were $55,071.09 leaving a projected balance on hand of $141,578.20. In response to Mr. Giannini, Mr. Field pointed out that the philosophy of CTFA in its investment practices is to be very conservative. Mr. Field stated, however, that all available monies are invested in interest bearing accounts and, within the conservative guidelines and requirements of the Federal Government for collateral, are invested to generate as much income as possible. (Emphasis added).

* * * * *

* * * In response to a question, Mr. Muck pointed out that CTFA cannot hire agencies or bill collectors to pursue delinquent accounts. It was also pointed out that the major area of difficulty with bankruptcy insurance is the U.S.D.A. requirement on confidentiality of grower and shipper records.

* * * * *

Mr. Sanderson stated that due to the Tax Reform Act of 1985, *he decided after much deliberation that personal use of employer-provided vehicles should be reported.* Hence, 1099s for personal use of company vehicles have been issued to employees based on 30% of lease value or mileage logs in Sacramento and 15% of lease value or mileage logs for field personnel. (Emphasis added).

Mr. Sanderson stated that he had been advised Mr. Geller is to be reimbursed for any tax liability incurred due to issuance of 1099s, including that issued in connection with Mr. Geller's trip. *Mr. Rasmussen confirmed that it was the industry's intention to provide Mr. Geller with the trip, not with a tax liability*, and *that Tree Fruit Reserve should reimburse for any additional expense created.* Mr. Sanderson stated that although he does not necessarily agree with IRS reporting policies, he feels it is inconsistent for organizations involved in the enforcement of regulatory provisions not themselves to observe such laws.

* * * * *

Computer

* * * The total cost of hardware and software under three pricing systems available is as follows: retail, $78,118; GSA, which does not involve sales tax, $51,039; and state, which includes sales tax, $55,127. The items to be purchased, with both the Sacramento and Dinuba offices in mind, would include IBM System 36 hardware, software, two IBM XTs, two printers and five display stations. The additional cost of first year maintenance, warranty, education and installation would be approximately $11,122.

Mr. Muck noted that CTFA was an instrumentality of the Federal Government, not an agency, and that other marketing orders had tried to get GSA prices without success. Mr. Sanderson stated that the CTFA office nonetheless would attempt to purchase the system at GSA prices to save the $4,000 sales tax and accordingly pay for the computer out of CTFA funds. The consensus of the committee was to proceed to purchase the computer system and to make sure the system was adequate to meet the present and future needs of CTFA.

* * * * *

* * * In response to Mr. Giannini, Mr. Muck stated that the three branches of the AMS have been combined into a single branch, with those branches being divided by function — one to review quality control programs, one to review volume control programs and another program to review regulations and advertising. Mr. Giannini asked if these separate sections were autonomous. Mr. Muck replied in the affirmative, *although final approval still lies with the Director of AMS.* * * *

* * * * *

* * * Mr. Giannini stated that he would not be going to Washington but asked whether CTFA might finance the trip for a Committeeman. Mr. Muck stated that the trip *could be funded through Tree Fruit Reserve.* It was moved by Mr. Petersen, seconded by Mr. Pinkham and unanimously passed for Tree Fruit Reserve to finance a trip to Washington for Mr. Micky George to review the protocol for Japan and Pacific Rim countries. * * *

* * * *

Mr. Sanderson reported that he recently attended a meeting concerning the Alliance for Food and Fiber at the Sacramento airport. Ms. Pam Jones is the director of this effort and at the meeting the Table Grape and Lettuce Commissions offered funding in the amount of $20,000 and $13,000, respectively, to try to counter adverse public opinion on the use of chemicals. Mr. Sanderson has been advised by Mr. Durando that the Grape and Tree Fruit League would soon request a contribution from the California Tree Fruit Agreement to support the Alliance. Mr. Sanderson characterized the request as a "sticky wicket" and said he is troubled by the implication of a marketing order program contributing to this organization. * * * Mr. Rasmussen stated that the Table Grape Commission is not providing money directly to the Alliance but has arranged to contribute through the Grape and Tree Fruit League. Mr. Muck stated that marketing order programs cannot fund the Alliance.

Mr. Rasmussen suggested that each commodity fund the project at $5,000 but not be committed beyond one year. It was moved by Mr. Pinkham, seconded by Mr. Petersen and unanimously passed that Tree Fruit Reserve contract with the Grape and Tree Fruit League to provide $20,000 to fund the Alliance for one year based on adequate reporting of the activities and that CTFA not be named directly as a sponsor of the program.

* * * * *

144. Pursuant to the Agricultural Marketing Agreement Act, both Marketing Orders 916 and 917, have "termination" provisions whereby the *Committee* becomes trustee for the purpose of liquidating the affairs of the Committees, including such duties as *accounting to the Secretary* and to dispose of funds not required to defray the expenses of liquidation in such manner as the Secretary may determine, *Provided, that to the extent practical, such funds shall be returned pro rata to the persons from whom such funds were collected.*

145. The Tree Fruit Reserve, a non-profit corporation, has no such obligations to abide by provisions of the Orders upon termination, and has made provisions to have its assets go to the University of California, at Davis. Thus, in the event of termination, the growers and handlers will never recover the excess amounts which they have paid as a result of the activities and close relationship of the Tree Fruit Reserve to the California Tree Fruit Agreement — a result contrary to the provisions of the Marketing Orders.

146. During the course of the *Wileman/Kash I* and *Wileman/Kash II* cases, the Department has defined the California Tree Fruit Agreement in various ways both at the hearings and on brief which has resulted in inconsistency of position. In the instant proceeding, Respondent contends that the California Tree Fruit Agreement is a lawful entity. However, in Federal District Court Case No. CV-F-87-392-EDP, Respondent argued successfully, that, among other things, the California Tree Fruit Agreement was not a legal entity — which the Honorable District Court Judge Edward Dean Price found after his review of the U.S. Attorney Carl Blackstone's Declaration in that record filed July 11, 1987.

In addition to the record evidence relating to the California Tree Fruit Reserve in *Wileman/Kash I*, which is incorporated herein by reference, the oral hearing in *Wileman/Kash II* revealed an abundance of additional facts of further corroboration and substantiation of matters, related directly or indirectly, to those set forth in *Wileman/Kash I*, which are briefly mentioned hereinafter and which elaborate on the thorough understanding of the California Tree Fruit Agreement, by the Honorable Judge Tashima, who rendered an opinion for the U.S. Court of Appeals for the Ninth Circuit (*Wileman Bros. & Elliott, Inc., et al. v. Leroy Giannini*, July 12, 1990) which emphasizes that "authorization to apply standards is far different than a standard setting role which was accomplished through the committees established by the Secretary, an Agency established by the committees (the California Tree Fruit Agreement), employees of the committees, and, the Federal-State Inspection Service. * * *

147. The activities of the California Tree Fruit Agreement were described more fully in the Administrative Law Judge's Initial Decision filed May 19, 1989, applicable to Nectarines and Plums for the years there involved, and are

appropriate with regard to this decision in *Wileman/Kash II*:

> The California Tree Fruit Agreement is composed of State personnel, *who carried out functions in a manner determined by them.* They publish led from time to time Bulletins which were relied upon by the Federal-State Inspection Service and the Secretary's Committee and Subcommittees. An example of such a Bulletin is contained in Exhibit 15 wherein it is set forth among other things, that that particular Bulletin was the 53rd Annual Report of the California Tree Fruit Agreement, an organization established in 1933 when Secretary of Agriculture Wallace issued the Nation's first Federal Marketing Order for Fruit Crops. It is further stated that the original programs were regulatory and applicable to interstate shipments of fresh Bartlett Pears, Plums and Peaches. Additionally, it stated that over the years, peach activity was for sometime confined to the Elberta variety but in 1972 revised again to include all varieties, Regulation of interstate commerce was undertaken and promotion in advertising of all fruits authorized. "Nectarines, a separate Federal Order, joined the organization in 1958 and processing pears, a California marketing program, in 1967 so that CTFA today comprises five programs . . . ."
>
> The California Tree Fruit Agreement personnel have been operating under a vague sense of discretion as to *Federal Marketing Orders.* Even if CTFA had been delegated authority by the Committees, such authority has never been published in the Federal Register, there has never been any notice and comment period with respect to CTFA being delegated said authority, and there has never been any substantial basis and purpose stated by the United States Department of Agriculture for said CTFA's alleged authority. CTFA has been granted authority by the Nectarine Administrative Committee and the Plum

Commodity Committee to cut off handler and grower requests for specific color standards and specific maturity standard variations and changes. However, this does not comply with the Administrative Procedure Act. CTFA's authority for making laws or for adjudicating laws has never been published in the Federal Register, nor has it been subjected to rule making requirements.

There is evidence of record to indicate that SPI Inspectors and California Tree Fruit Agreement personnel treated some Committee members with favoritism, and California Tree Fruit Agreement discriminated against the Petitioners. The color standards and maturity tests are not applied equally to all handlers and said color standards have been more onerous on the Petitioners than members of the Committees and some of the Committee members' friends.

Mr. Gary Van Sickle is the Field Director for the California Tree Fruit Agreement. He has never grown Nectarines, nor Plums, except for a tree or two of Santa Rosa Plums in his backyard. Prior to becoming a CTFA agent he was a packing shed employee for seven or eight years. During that seven or eight years, he worked at several packinghouses, all in Northern California. He has never been a buyer of Nectarines and Plums. He has never been a wholesale seller of Nectarines and Plums. When the "well-matured" standard was first implemented, Mr. Van Sickle received his instructions and authority from the Committee. He did as he was instructed by the Committee. He also took his directions from the Manager. Mr. Van Sickle also takes orders from the Chairmen of the Committees and considers himself an employee of the Committees. At one time when Mr. Charles Sanderson, the Manager of the California Tree Fruit Agreement was in poor health, Mr. Jon Field and Mr. Van Sickle were both candidates for the position

of Manager of the California Tree Fruit Agreement. Mr. Van Sickle is the Supervisor for CTFA Field Agents, Mr. Al Black and Mr. Dale Janzen. The CTFA Agents make Field Notes or Field Reports which were internal documents to keep the staff in the Sacramento Office apprised of the growing and production area managed by the Dinuba Office. It is basically used to keep Mr. Jon Field apprised of what is going on. The Field Agents, including Mr. Van Sickle, fill out the reports they come to the Sacramento Office on a daily basis and then Mr. Field distributes them to the staff in the Sacramento Office.

Mr. Jon Field is the Manager of the California Tree Fruit Agreement. He was the Assistant Manager beginning in 1981 and when Mr. Sanderson, the Manager, developed poor health, Mr. Field acted in a management capacity but was still the Assistant Manager. He acted in the capacity of Manager of CTFA beginning in March of 1987. Mr. Van Sickle is a subordinate of Mr. Field. Mr. Field being in charge of the CTFA is basically responsible for putting together all of the paperwork, all of the forms, and having all of the material ready for all of the commodity meetings, preparing the booklets, and is the management for all of the committees. The management umbrella of CTFA is for State Marketing Orders and the Federal Marketing Orders. The expenses of CTFA are paid for by assessments: 23.4 percent is paid for by peaches, 23.4 percent is paid for by Plums, 23.5 percent is paid for by Nectarines, 17.9 percent is paid for by pears, and 11.9 percent for the pear zone (canned pears). California Tree Fruit Agreement does not have the power to establish law.

Even though the California Tree Fruit Agreement was under contract with respect to the performance of its duties, the evidence herein fails to show that the *CTFA*

had any delegated authority from the Secretary of Agriculture. CTFA did in fact exercise regulatory authority over the fruits that were being grown, harvested and shipped out of California, and such fruits included Plums and Nectarines. As previously noted, CTFA was an establishment which began in 1933, and its authority and powers have grown with the years. Although CTFA's efforts to promote the tree fruit industries are commendable, this does not replace the necessity for proper delegation and publication of the functions and duties which they were performing, perhaps unknowingly, on behalf of the Secretary of Agriculture.

The CTFA was never delegated legislative and/or judicial authority. Even if there had been such a delegation, there were violations of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

At no time has the Secretary of Agriculture, or, CTFA ever published in the Federal Register or made known its authority or any other requirements listed in section 552(a) of the Administrative Procedure Act. The only publication in the Federal Register which even mentions the California Tree Fruit Agreement is section 917.110 of the Plum Marketing Order which states that reports, applications, submittals, requests and communications "in connection with a Marketing Agreement and Order shall be addressed as follows: 'Control Committee, California Tree Fruit Agreement, 701 Fulton Avenue, Sacramento, California 95825.' " Mr. Van Sickle testified that as far as he knew, there was no CTFA operating manual. He takes oral direction from the Committees and their Chairmen, and Mr. Field represented that the only reason the CTFA agents received "certifications" from Mr. Brader was to permit CTFA agents to check license plates through the law enforcement computers in California. The certifications referred to relate to the testimony of Mr. Brader,

Director of the Fruit and Vegetable Division, wherein he indicated that there was a certification of Mr. Van Sickle as a Compliance Investigator. Nowhere in the Federal Register is there publication relative to CTFA's "statements of the general course and method by which its functions are channeled and determined," and other requirements of the Administrative Procedure Act. Neither CTFA nor the Committees can determine their own authority, nor the constitutionality thereof. *Transp. Inc. v. United States*, 629 F.2d 467 (1980), *cert. denied*, 101 U.S. 941; *United States v. Frontier Airlines Inc.*, 563 F.2d 1008 (1977). The CTFA Bulletin published every year does not suffice to accord with the requirements of the Administrative Procedure Act. *There is a strict command in section 552 that a body's authority must be published in the Federal Register. Otherwise, there can be unknown persons making unknown decisions without any accountability.*

The Secretary issued an amendatory regulation in 1980 which merely provided that maturity should be determined by color standards or other tests deemed appropriate by the Federal-State Inspection Service. At once, CTFA's "authority," was *deemed* expanded to an area never before stated in the Federal Register, never subject to rule making, and never subject to scrutiny. They issued Decisions, Opinions, Concurrences and Orders without ever complying with section 552(ii) of the Administrative Procedure Act. CTFA assumed unspecified enforcement power, unspecified judicial power, and, unspecified legislative powers. The CTFA agents' powers, duties, as well as their bulletins, were never subject to scrutiny through any public rule making, yet their decisions held the fate of the handlers in their hands.

There was no more powerful regulator nor adjudicator, during the times pertinent herein, than CTFA, which at

the conclusion of the season, would gather with SPI, and purportedly discuss the maturity regulations for the past seasons, and implement changes or set new standards, or reestablish the same standards for the next harvest season. That was not preceded by rule making. CTFA's authority to do that was never preceded by rule making, and their authority to do it was never published in the Federal Register. CTFA's authority during the season to change "color chips" on the spot, to overrule or override SPI's recommendations (particularly in light of the fact that Plum Regulation 19 and Nectarine Regulation 14 required SPI to determine the standards) and CTFA's red tagging fruit that does not meet the standards, and ordering the repacking of fruit, are legislative and adjudicatory functions in their purest sense, and none of it was preceded by proper delegation or rule making, and their authority to even propose, and in substance enact, legislation in the first place has never been made known or published. *A citizen wishing to know what the law was, who made it, and how to comply with it encountered a baffling situation.*

Only *SPI was granted authority by the Secretary to determine and set standards. This authority was either relegated or taken over by CTFA and the Committees.*

The testimony of Mr. Brader, Mr. Hirata, and Mr. Botkin is further substantiated by that of other witnesses. Mr. Jonathan Field, the Manager of CTFA since March of 1987 described the workings thereof including, the making of reports, and the tracking of pack outs, and the sending out of notices for assessment and the collection of assessments. Mr. Field further described the method whereby the inspection costs were determined for the coming year based partially upon the anticipated fruit that was to be shipped and based thereon, the ability to anticipate personnel requirements and the costs

associated therewith. In addition, Mr. Field described the promotion meeting which was also held during the month of March. CTFA works primarily in the unregulated media and considers itself an "in house public relation agency." Also, CTFA regards itself as an "in house fruit service." (Tr. 1892-1893). The total program for promotion in 1987 was approximately 4.8 million dollars.

That Mr. Field viewed the Inspection Service as sort of a bystander is reflected in his testimony commencing at Transcript 1911 through 1915. * * *

The findings of this paragraph were arrived at from the testimony and documentary evidence of the *Wileman/Kash I* hearing, and additionally have been corroborated by evidence adduced at the present hearing.

148. In an effort to thwart the Petitioners' assertions of lack of delegated authority as required by the Administrative Procedure Act, the Department has assumed varying postures as to the California Tree Fruit Agreement, none of which provides guidelines as to who does what. The latest is contained in the Judicial Officer's Decision of July 9, 1990, in *Wileman/Kash I* wherein he adopted, to a great extent, the statements of the Intervenor and Respondent in that case. The Judicial Officer has determined that the California Tree Fruit Agreement is anything you want to make or call it. The following excerpts are from his decision in *Wileman/Kash I*:

The term "California Tree Fruit Agreement" (CTFA) is a term that had different meanings, depending on the context in which it is used. The term is variously used by different people, or even the same people at different times, to refer to any or all of the various groups of people associated with Marketing Orders 916 and 917, or to Marketing Order 917 by itself. To growers, handlers, and others associated with the industry, "CTFA

requirements" may mean, at times, explicit USDA regulations under Order 916 or Order 917, or specific maturity tests either as determined by the Inspection Service or as determined by changes and variances made by the administrative committees. Inspection Service personnel use the term to refer to any Committee members or staff personnel or to requirements under the two Marketing Orders, as distinct from Inspection Service personnel and the requirements in the U.S. Standards. The Committees' members and the hired staff personnel tend to use the term "CTFA" to mean the hired staff employees, and use "CTFA requirements" to mean any Marketing Order requirements, although *such usage is not consistent.* (See, e.g., Tr. 2631-32).

The term CTFA is nowhere defined in Marketing Orders 916 and 917, and is used just once in the regulations for Order 917, where there is a reference to sending reports, requests, etc., to the "Control Committee, California Tree Fruit Agreement" (7 C.F.R. § 917.110). The term "Control Committee," is defined as the overall administrative committee for Order 917 (7 C.F.R. § 917.16-.35), which also has individual Commodity Committees for each of the three fruits covered by the Order (plums, peaches, and pears). The Control Committee consists of a number of handlers and a number of growers from each of the commodities, and it has the ultimate authority to hire the Chief Executive Officer of the CTFA staff.

In a 1977 memorandum of agreement between the Control Committee of CTFA (i.e., the Control Committee of Order 917), the Nectarine Administrative Committee, and the Pear Program Committee, the term CTFA is defined to mean Order 917, and it is agreed that the Control Committee of Order 917 will provide all paid staff services and facilities for Order 916 and a California

State Processed Pear Marketing Order through a somewhat complicated arrangement where by the latter two Marketing Order Committees have input into the staff hiring and other expenditures (through a joint Management Services Committee)[11] (Ex. 1, CTFA 4-A). The staff employees paid under this arrangement are *sometimes* referred to as the CTFA, or the CTFA staff.

149. *The Wileman/Kash I* evidence shows that a meeting of the Maturity Subcommittee could not and did not take place *unless both* the California Tree Fruit Agreement fieldman and an Inspection Service employee agreed thereon. The same was true of California Tree Fruit Agreement's participation in granting variances. Also, the utilization of "supervising discretion," in changing the color chip requirement and granting variances partook of unilateral, subjective determinations.

150. The evidence in *Wileman/Kash II*, reveals that the California Tree Fruit Reserve was a troubled office, beset with internal conflicts (Tr. 4821-23, 4819-4866), all of which increases the need for Administrative Procedure Act compliance so that the growers/handlers can achieve certainty as to their everyday business affairs. Mr. Field acknowledged that the California Tree Fruit Agreement was not running smoothly including people being fired (Mrs. Tulley) and (Mr. Pisciotta) or under the threat of being fired (Mr. Van Sickle), the manager's wife being hired to do art work for the California Tree Fruit Agreement (Tr. 4882, 4897), Mr. Van Sickle's wife working for the California Tree Fruit Agreement (Tr. 4883), California Tree Fruit Agreement employees while on official time attending the Tree Fruit Reserve meetings (Tr. 4915-4917);

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[11]The Management Services Committee is made up of the Chairman of each of the four Commodity Committees (Bartlett pears, peaches, plums, and nectarines). Also, the Chairman of the Control Committee is on the Management Services Committee. • • • (Emphasis added).

the Tree Fruit Reserve receiving gratuitous services from the California Tree Fruit Agreement — but all that is not Petitioners' fault — they certainly were paying enough in assessments.

151. These internal conflicts spilled over to Committeemen. Chairman Giannini threatened to withhold his assessments unless the Sacramento office was closed. (Tr. 4863, 4873). Mr. Field did not want to butt heads with Mr. Giannini. (Tr. 4863-4867). A prior manager of the California Tree Fruit Agreement had done so and found himself without a job. (Tr. 4867).

152. Notwithstanding that the determination of the amount of the assessments, and the collection thereof, is a responsibility of the Secretary of Agriculture, the California Tree Fruit Agreement, through the Tree Fruit Reserve, would have a handler in this highly regulated industry, look to the Tree Fruit Reserve. Nowhere, in any publication, is there any direction, or delegation, to the California Tree Fruit Agreement or the Tree Fruit Reserve, to carry out the functions described in the August 12, 1988, Minutes. (Ex. 164A):

> Q. I'd like to read you a sentence out of these minutes, Mr. Field. "It is also the consensus that Tree Fruit Reserve move forward, through its attorney, Mr. Thomas, to aggressively enforce collection of CTFA assessments." Mr. Field, whose job is it to collect assessments against any client, Tree Fruit Reserve or CTFA?
>
> A. It's the USDA, the USDA, * * * (Tr. 4902).

The California Tree Fruit Agreement need not abide by normal accounting practices of capitalizing assets and depreciating them (as originally contemplated in promulgation proceedings) but rather the California Tree Fruit Agreement "expensed" assets on an annual basis. The authority of the Shipping Point Inspection was relegated to that of a

neutral body, merely observing and sometimes making recommendations.

153. The Department's views as to whether the actions of the California Tree Fruit Agreement are consistent with the Administrative Procedure Act and the Marketing Order's requirements cannot prevail as to these Petitioners. In this regard the testimony of Mr. Brader in *Wileman/Kash I* is highlighted because it showed there, and testimony and evidence in *Wileman/Kash II* strengthens Petitioners' position, as to lack of delegation, instruction, and/or knowledge on the part of the Secretary's employees, delegatees, and the California Tree Fruit Agreement, as to their duties and responsibilities yet they are the ones to whom the handlers must look for proper administration of the provisions of the Orders.

154. The active role and determinations of the California Tree Fruit Agreement, involved not merely operational determinations, but those of standard making and policy judgments, and adjudications having the force of law which go to the very core of the Orders, and belie any contention that adherence to the Administrative Procedure Act was not required. It was. Even if the California Tree Fruit Agreement is an "employee" of the Committees there still was lacking authority for the California Tree Fruit Agreement to operate in the manner which the evidence of record shows occurred. This is particularly true in the instant case which reveals the intertwinement of the California Tree Fruit Agreement with the Tree Fruit Reserve. No Secretary of Agriculture nor any Committee, nor Chairman thereof, had the authority, to allow the California Tree Fruit Agreement to create and utilize an *alter ego*, the Tree Fruit Reserve, to accomplish ends and purposes specifically contrary to the Agricultural Marketing Agreement Act and the Orders' provisions.

155. The Committees, through their employee, the California Tree Fruit Agreement, could not legally, be delegated, to do that prohibited to the Secretary. It is no wonder that the California Tree Fruit Agreement's and the Tree Fruit Reserve's roles, actions, meetings, discussions, were never subject to rulemaking, nor any alleged delegation ever published in the Federal Register.

156. Notwithstanding lack of authority from the Secretary or the Committees, the Petitioners have had to pay assessments to the California Tree Fruit Agreement, to maintain various types of books and records and to prepare and make detailed regular reports to the California Tree Fruit Agreement; to engage in various "generic" advertising programs formulated by the California Tree Fruit Agreement, and with which Petitioners disagreed and to be subjected to a system fought with favoritism and unequal treatment. The record evidence herein shows a difference in treatment as to the Serimians Bros. and Petitioner Kash, Inc. and the explanation of Respondent therefor is not credible. In addition, the record evidence herein, and in *Wileman/Kash I* revealed other instances of favoritism.

The determination of what to do with one in apparent violation (i.e., make a personal visit, put a note in the file, refer to Agricultural Marketing Service, submit for prosecution, etc.) was made by the California Tree Fruit Agreement without published and known Guidelines.

Mr. Field's description of why a certain handler was treated differently included reliance on Agricultural Marketing Service's Regional Attorney, Mr. Will Jennings. The handling of this matter may well have been proper, but it highlights what Petitioner Kash regards as improper as to him. With respect to the Serimians, who had shipped in violation, Mr. Field sent them "a letter to formalize that they were in violation and formalize that it should not occur again." (Tr. 4802).

157. Also, as a result of the California Tree Fruit Agreement determinations the "generic" advertising program "tilts" toward those handlers chosen by the California Tree Fruit Agreement, i.e., forty to sixty percent of the varieties are handled by one handler and shipped under one label (Tr. 4888, 4890-92) thus benefiting certain handlers over others, to these Petitioners' detriment.

The evidence and record show, factually, that the advertising promotion money is not on the basis of varieties that cross over the breath of the industry and not specific to any one handler, but more likely is based on volume — even if no other shipper sells the same fruit. (Tr. 4894-4895).

158. The California Tree Fruit Agreement could not legally assume powers and functions which the Commodity Committees did not have. The fact that the California Tree Fruit Agreement employees usurped legislative and adjudicatory powers with respect to persons regulated under the Orders, does not comport with either the Agricultural Marketing Agreement Act or the Administrative Procedure Act. Their activities far transcended ministerial rules and regulations.

The California Tree Fruit Agreement has received no delegated authority by the Secretary of Agriculture pursuant to the Administrative Procedure Act, nor ever been recognized in the Federal Register, nor has a substantial basis and purpose ever been issued by the United States Department of Agriculture setting forth the bounds of their employment and/or authority. At best it was used by the Committees in an employee relationship. There are no standards by which to judge the California Tree Fruit Agreement's actions when it sets color standards, makes assessments or collects assessments. Nor does it have the authority to require Shipping Point Inspection. That is derived from the provisions of the Orders. Although the California Tree Fruit Agreement may have "run" the Orders (see *Wileman/Kash I* Decision) it

was doing so in a manner not in accordance with law and the Marketing Order provisions.

159. As regards color chips, in *Wileman Bros. v. Giannini, supra*, the Ninth Circuit of the U.S. Court of Appeals under its standard of review, and with respect to the Defendants therein, stated, among other things that they:

> * * * substituted heightened standards for the "maturity" required of each variety[2] of plums and nectarines before it could be picked. They issued and enforced a "well-matured" standard, without authorization from the Secretary, to improve their own profitability and diminish the earnings of plaintiffs [petitioners herein]. Pursuant to this standard, a system of color chips (ranging from fairly green to bright yellow) and descriptive tables, enabled defendants [the California Tree Fruit Agreement employees and Committee Chairmen] to require some varieties to remain on the tree longer. This was accomplished through the committees established by the Secretary, an agency established by the committees (the California Tree Fruit Agreement), employees of the committee, and the Federal-State Inspection Service. In addition to discriminating against the varieties of nectarines and plums grown by plaintiffs [Petitioners herein], defendants [the California Tree Fruit Agreement employees and Committee Chairmen] discriminated against plaintiffs [Petitioners herein] by refusing to grant color variances which were granted to producers favored by defendants (the California Tree Fruit Agreement employees and Committee Chairmen]. By requiring yellower colors, defendants [the California Tree Fruit Agreement employees and Committee Chairmen] constricted supply during certain

[2]Santa Rosa plums, for instance, are one variety. There are over 95 varieties of plums and over 80 varieties of nectarines subject to these regulations.

> parts of the season, capturing for themselves the "marketing windows" in which tree fruit commanded premium prices, and causing significant losses to plaintiffs [Petitioners herein] in wasted fruit and reduced revenues.
>
> * * * * *

In May, 1980, the Secretary published Nectarine Regulation 12 and Plum Regulation 16, amending the respective marketing orders. Both provided that the fruit must grade at least U.S. No. 1 and, for the first time, that "maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service." Nectarine Reg. 12, 45 Fed. Reg. 32,308 (1980) (to be codified at § 916.35(b)(1)); Plum Reg. 16, 45 Fed. Reg. 33,596 (1980) (to be codified at § 917.45(a))[6] *This new language governing standards and tests is ambiguous as to whether the maturity*

[6]Assuming that there was authority for the establishment of higher maturity standards, plaintiffs argue that such authority was in the inspection service and not in the committees. Because the regulation does not speak of establishing standards, but only of determining the propriety of tests to determine maturity, the express delegation of those tasks to the inspection service does not resolve the question. The regulations do not support the view that a standard-setting role was assigned to the inspection service.

The committees are empowered to "make such rules and regulations . . . as may be necessary to effectuate the terms and provisions of (the marketing order]." 7 C.F.R. § 917.35(b); 7 C.F.R. § 916.30(c). Such rules and regulations need not be approved, but may at any time be declared null and void by the Secretary. 7 C.F.R. §§ 916.62, 917.30. Conversely, the inspection service certifies that fruit complies with regulations issued by the Secretary. 7 C.F.R. §§ 916.55, 917.45. Based on the limited role of the inspection service in the scheme of the marketing orders, the 1980 regulations should not be interpreted to place standard-setting authority in those services. The revised regulation merely authorizes the inspection services to apply the maturity standards developed by other actors.

standards themselves were being or would subsequently be modified and, if so, by whom. No other language in the regulations supports departing from the basic maturity standard: that stage of growth at which, after picking, the fruit will ripen properly. *E.g.*, 7 C.F.R. §§ 2851.1530, 2851.3153 (1980).

The regulations amending the marketing order did not remove existing limits on the authority of committees to change maturity standards. The marketing order provides that the Secretary may issue regulations upon the recommendation of the administrative committees:

> Such regulations may: (1) Limit, during any period or periods, the shipment of any particular grade, size, quality, *maturity*, or pack, or any combination thereof, of any variety or varieties of nectarines grown in the production area; (2) Limit the shipment of nectarines by establishing, in terms of grades, sizes, or both, minimum standards of quality and *maturity* during any period when season average prices are expected to exceed the parity level . . . .

7 C.F.R. § 916.52(a) (emphasis added); 7 C.F.R. § 917.41(a) (plums). The provision for committee recommendations provides that: "Whenever the committee deems it advisable to regulate the handling of any variety or varieties of nectarines in the manner provided in § 916.52, it shall so recommend to the Secretary." 7 C.F.R. § 916.51(a); 7 C.F.R. § 917.40(a). These sections require that "whenever" the committee seeks to impose particular maturity standards, it does so only through recommending standards to the Secretary.[7]

[7]Higher maturity standards are not the type of ministerial or facilitative regulations that "effectuate the terms and provisions" of the marketing orders. The requirement that changes in maturity standards be recommended to the Secretary forecloses the interpretation that the provision for administrative regulations was intended to embrace such changes.

The "supplementary information" published with the regulations in the Federal Register may support defendants' position. The findings accompanying the Plum Regulation state that "[The grade and size regulation specifies a minimum grade of U.S. No. 1 for all varieties of plums except that provision is made for a higher maturity standard." 45 Fed. Reg. at 33,596. A similar finding was made with respect to the Nectarine Regulation. 45 Fed. Reg. 45,252 (1980) (first amended order). The phrase "provision is made" is, unfortunately, less than precise. Arguably, it suggests activity beyond merely the determination of tests for maturity, and envisions decisions by actors to whom the Secretary has delegated authority since he would not have to make any such provision for regulations he intended to issue himself. As demonstrated above, however, the regulations do not effectuate this supposed intent. The court cannot rely on this vague suggestion of intent to rationalize or disregard the clear language of the regulation. "The language of a regulation or statute is the starting point for its interpretation.[ ] The plain meaning governs unless a clearly expressed legislative intent is to the contrary, [ ] or unless such plain meaning would lead to absurd results." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). Here there is neither a clearly expressed contrary regulatory intent nor an absurd result.

[3]Defendants were not authorized by these regulations to promulgate and enforce higher maturity standards. Absent authorization in some other form, defendants are not immune from suit under section 608b with respect to this activity.[8] [Footnote omitted]

160. Based on the evidence of record, it is found that the establishment and enforcement of color standards through

use of color chips by the California Tree Fruit Agreement are not ministerial and administrative functions, but rather substantive rules which must be formulated in accordance with the Agricultural Marketing Agreement Act and the Administrative Procedure Act.

161. The whimsically nature of color chips as not being a true determinative of maturity was emphasized in evidence adduced at the *Wileman/Kash II* oral hearing. In early 1988, it was decided to obtain "new" color chips, which allegedly were to reflect the same color as the old. Repeated attempts were made to achieve that end. *During the process, chips differing in color from the old ones were used, along with the "old" ones but they were not alike.* If one were shipping fruit he could have used either set — the old or the new color chips.

162. Subsequent to the oral hearing in *Wileman/Kash I* and prior to the issuance of a decision by the Administrative Law Judge therein, the Secretary, on April 8, 1988, issued for the first time, a proposed rule to incorporate the term "well matured." This proposed rule intended, with respect to Plums, to regulate out smaller sized Plums, to incorporate a procedure for requesting variances from the proposed "well matured" maturity standard which was to be determined by the use of color chips, which were to be applied by the Federal-State Inspection Service. (53 Fed. Reg. 11669). This proposed rule provided that interested persons could file comments through April 25, 1988. Subsequently, the time period for filing written comments on the proposed rule was extended to May 2, 1988. (53 Fed. Reg. 13413).

163. On April 19, 1988, the Secretary issued proposed rules (virtually identical to those above mentioned relating to Plums) with respect to eliminating smaller-sized Nectarines and Peaches, incorporating a variance request procedure, and implementing the "well matured" maturity standard to be determined by the use of color chips, which

were to be applied by the Federal-State Inspection Service. (53 Fed. Reg. 12687 (Nectarines); 53 Fed. Reg. 12691 (Peaches)). The proposed rule provided that interested persons could file comments through May 3, 1988.

164. In his proposed rule for Nectarines, the Secretary set forth the following reasons for *not providing a thirty-day notice and comment period as required by the Administrative Procedure Act*: "A comment period of less than thirty days is deemed appropriate for this proposal. The harvest and shipment of the 1988 nectarine crop is expected to start April 25, 1988, and growers and handlers should be given as much notice as possible of any changes, if adopted to permit the industry to plan accordingly. Moreover, the Department already has received letters in opposition to the proposed nectarine-size changes indicating the industry is aware of the Committee's recommendation." (53 Fed. Reg. 12690).

165. The explanation given by the Secretary (except for the fruit harvest start up dates) for his failure to comply with the requirements of the Administrative Procedure Act and his own Departmental policy, read identically, with respect to Plums and Peaches, as the above cited statement regarding Nectarines. Although Petitioners refer to the Departmental policy, it is denied by Respondent that this is, in fact, a Departmental policy.

166. It is Respondent's position that the Administrative Procedure Act and the Departmental regulation 1512-1 do not require a comment period of thirty days. The Respondent's position is mostly accurately contained in its brief, as follows: "As previously discussed, the Administrative Procedure Act has no such requirement. The only comment period required is one which will provide interested persons with a reasonable opportunity to respond. *Phillips Petroleum Co. v. United States EPA*, 803 F.2d 545, 559 (10th Cir. 1986). Also as previously discussed above, departmental regulation 1512-1 provides no support for Petitioners'

contentions. The departmental regulation is merely an internal directive which sets a goal 'to improve internal management.' Further it only recommends a thirty-day comment. It does not require one. The directive provides no right on which Petitioners may rely. *See, Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974). Petitioners may not attempt *to burden the Department with rulemaking requirements beyond the structure of the Administrative Procedure Act. See, Vermont Jencke*, 435 U.S. 524. * * *"(Emphasis added).

167. On May 27, 1988, the Secretary issued Interim Final Rules, purportedly binding on Wileman/Kash, which substantially altered the maturity determination and the procedure for requesting variances from the new maturity determinations. The Interim Final Rules, as published, were substantially different than those set forth in the proposed rules issued approximately five weeks earlier. In said Interim Final Rules, the Secretary rejected the Plum Committee's proposal to eliminate small-sized Plums, but at the same time, the Secretary adopted the respective Committee's proposals to eliminate small-sized Nectarines and Peaches. (53 Fed. Reg. 19218 (Plums)); 53 Fed. Reg. 19226 (Nectarines); 53 Fed. Reg. 19234 (Peaches)).

168. Petitioners, through their Attorney, submitted comments in opposition to the proposed rule modifications regarding Plums, Nectarines and Peaches. Subsequent to the issuance of the Interim Final Rule, Wileman/Kash, through their Attorney, submitted comments in opposition to the Interim Final Rules as published.

169. With respect to utilizing color chips as a test for maturity the 1988 regulations were arbitrary and capricious and without substantial basis.

The internal maturity of Peaches, Plums and Nectarines can be determined accurately and objectively by different

types of tests other than through the application of color chips and/or spring tests. The surface color of Peaches, Plums and Nectarines and the spring of Plums does not objectively nor rationally determine whether or not those varieties are of good consumer quality and good marketable quality.

The color chips and spring tests were imposed upon Petitioners prior to the conducting of any meaningful scientific studies whatsoever. And the few studies which were conducted by the Commodity Committees were not made part of the rulemaking record because those studies, themselves, demonstrate that the color chips and spring tests imposed by the Secretary do not bear any rational or reasoned relationship to the internal maturity of Peaches, Plums and Nectarines.

170. It is clear that the proposed, Interim Final, and Final Rules issued by the Secretary for the 1988 and 1989 harvest seasons relating to the determination of maturity by color chips were not based on a substantial record, are arbitrary and capricious, and are not binding on these Petitioners.

171. In addition to not providing a 30-day notice and comment period as set forth in the Secretary's own Departmental regulation 1512-1, and the Administrative Procedure Act, the Secretary further stated: While this action will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the Marketing Orders. Therefore, the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities." (53 Fed. Reg. 27152).

172. The Departmental Regulation to which reference is made regarding decision-making requirements, states that:

> The Department is committed to providing the public reasonable opportunity to participate in rulemaking. For rules that have a substantial effect, it is recommended that comment periods on proposed regulations be thirty-days or more.
>
> [U.S.D.A. regulatory decision making requirements, 1512-1, p. 9, December 15, 1983.]

173. The decision of the Secretary with respect to assessments, which include those for "generic" advertising, impact every handler of tree fruit in the State of California, and costs in excess of $9,000,000 a year.

174. There is evidence in this case to indicates that the referenced "public committee meetings" do not provide the requisite atmosphere for a careful study and inquiry into the matters which are important to the handlers and growers. There is also evidence to show that those in control of the Tree Fruit Reserve, which included the Commodity Committee Chairmen, members of the Commodity Committees, and employees of the California Tree Fruit Agreement, in non-public meetings, which are not open to the public, with notice thereof not generally given, exert an undue amount of control and influence over the tree fruit industry. They do not believe themselves subject to the "Sunshine Laws" discussed *infra*. What remains to be accomplished at the "open" and "public" Commodity Committee meetings is that of *pro forma* acceptance and adoption of what has previously been agreed upon. The Administrative Procedure Act contains no provision to indicate that Committee meetings are a substitute for required rulemaking hearings and the provisions regarding same. Other than the Committee Chairmen and Committee members, there is no evidence to indicate the numbers, if any, of other growers/handlers and

their percentage to the total thereof who might attend such Committee meetings. The requirements of section 553 of the Administrative Procedure Act must be followed when an agency is exercising its legislative function in order that its rules have the force of law. There are only two exceptions to this requirement applicable herein and they are discussed hereinafter.

175. A review of the Secretary's rulemaking record clearly establishes that the Secretary has unilaterally determined that the 30-day notice and comment period has no application in the tree fruit industry.

176. Sections 917.460 (Plum Regulation No. 19), 917.459 (Peach Regulation No. 14) and 916.356 (Nectarine Regulation No. 14), and their respective tables, showing the specific "maturity tests" or other "color standards," of the Nectarine, Plum and Peach regulations issued in 1988, and the obligations imposed therewith, as written and/or as applied, are not in accordance with law;

177. The Secretary's imposition of size restrictions as to Nectarines and Peaches for the 1988 and 1989 harvest seasons were in violation of the notice and comment requirements of the Administrative Procedure Act.

178. The imposition of the "well-matured" maturity standard for the 1988 and 1989 harvest seasons was in violation of the notice and comment requirements of the Administrative Procedure Act.

179. The Nectarine, Plum and Peach Committee members, through their "alter ego" corporation, the Tree Fruit Reserve, have intentionally failed to comply with either the "Sunshine" laws, or the Federal Advisory Committee Act.

CONCLUSIONS

Prologue

In an effort to expedite this matter to the extent available to the Administrative Law Judge, I have briefly summarized the contentions of the parties, which contentions are more fully set forth in their briefs and respective pleadings, and, to the extent applicable, are incorporated herein.

As was noted earlier, the Petitioners herein have constitutionally vested property rights at issue. Likewise, they are granted the right, under the enabling statute to have the Secretary hear and decide the legality of their claims that they should be relieved of the obligations of the Orders' provisions. In fact, they must do so. This is a statutory mandate.

Congress has explicitly furnished a handler an expert forum for contest. The doctrine of exhaustion of administrative remedies, enacted for the principal purpose of allowing the affected agency to pass and rule upon the questions involved prior to judicial review, has been a doctrine constantly before the Federal Courts. *Cf., Coit Independence Joint Venture v. FSLIC* 109 S. Ct., 1361 (1989) where there was no statutory exhaustion requirement and where it was recognized that exhaustion requirements might be waived for discretionary reasons by courts. The relevant regulations in the *Coit* case provided that creditors of failed savings and loan associations had to file their claims with FSLIC. The Petitioner therein brought suit on a state law claim against a savings and loan association in a court without exhausting the administrative claims procedure. The court ruled that exhaustion was not required because the regulations setting up the claims procedure did not place a clear and reasonable time limit on FSLIC's consideration of claims. The lack of such a reasonable limit rendered the claims procedurally inadequate, because it allowed the agency to delay the

administrative processing of claims indefinitely, which would deny litigants their day in court, while the statute of limitations ran; and because it could enable FSLIC to coerce unfair settlements because the receiver's assets could be depleted by interim distributions before the claimants got to court; and because FSLIC itself was often the main creditor and consequently could well have had an incentive to delay decisions on claims. Other cases involving situations where Petitioners sought to go directly to a court for a *de novo* determination on the merits of state law claims are set forth in such cases as *ABC Plumbing and Vernon S&L*, 257 Cal. Rptr. 139 (Ct. App. 1989). For other exhaustion cases, see, *Rafeedie v. Immigration and Naturalization Services,* 880 F.2d 506 (D.C. Cir. 1989) (constitutional claim); *Ben Lomond, Inc. v. Anchorage,* 761 P.2d 119 (Alaska 1988) (both constitutional and nonconstitutional issues raised). It win be noted that the procedure before the United States Department of Agriculture contains neither statutory nor procedural time limits, but nonetheless exhaustion of administrative remedies is required under the Act.

These Petitioners have presented cogent and persuasive evidence to the effect that they have been illegally discriminated against in the administration and application of Marketing Orders 916 and 917; that arbitrary and capricious actions and abuse of discretion, have resulted in substantial economic losses; that provisions of the Administrative Procedure Act have not been followed; and, other Constitutionally protected interests have been affronted. This being so, the provisions and obligations imposed in connection therewith are not "in accordance with law." The Equal Protection Clause requires that those similarly situated be treated similarly. *Peyote Way Church of God v. Thornburgh,* (5th Cir. No. 88-7039, February 6, 1991).

The Petitioners' proof transcends inquiries of policy, desirability, or effectiveness of Marketing Orders 916 and 917

and, instead, deals with the legality thereof and the actions taken thereunder. They seek not a repudiation of Marketing Orders, but rather, a quest for fair, equitable treatment and formulation and administration of the Orders according to law. This, indeed, is not a proceeding to redraft regulatory language or to otherwise perform legislative functions. Nor is it our attempt to second-guess the Secretary's administrative and rulemaking functions.

The Respondent's position in this proceeding is to foreclose the Petitioners from raising and pursuing many of the issues which they have set forth in their Petition and which are premised upon evidence adduced at the hearing. This position substantially ignores the requirements of both the Administrative Procedure Act and the Constitution of the United States.

Fundamentally, many of the Petitioners' arguments are premised around the simple principle that any time the Secretary issues a regulation prohibiting handlers (and/or their growers) from receiving economic value for their crops, for which they have spent large sums of money in cultivating, harvesting and packing, a "taking" has occurred which requires just compensation. Such taking can only be justified for "public use" and not for private use. There can be no doubt in this case that there has been a "taking" in that Petitioners have been deprived of the full value of their crops. The question for resolution is whether or not such taking can be justified. The Constitution of the United States protects economic liberties no less than civil rights.

The Supreme Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113 (1972), held that the right to own and enjoy property is a fundamental aspect of personal liberty, not a privilege dependent on the whim of the sovereign. In *Nollan v. California Postal Commission*, 107 S.Ct. 3141 (1987), the Supreme Court held that whenever there is a "permanent physical occupation" of the

property by the government itself or by others, there has been a taking.

This proceeding differs from *Wileman/Kash I* in that different issues, circumstances, pleadings, dissimilar facts and time periods are involved, as well as an additional different fruit. First, the *Wileman/Kash II* record evidence expands and explains in further detail the operations of the California Tree Fruit Agreement. Second, *Wileman/Kash II* involves Peaches, which were not passed upon in *Wileman/Kash I*. Third, the relationship of the California Tree Fruit Agreement and the Tree Fruit Reserve was not brought up in *Wileman/Kash I*. The Ninth Circuit's decision in *Wileman Bros. & Elliott, Inc. et al. v. Leroy Giannini Packing Corporation, Virgil Rasmussen, Ballantine Produce Co., Inc., Patrick Pinkham, and Gary Van Sickle* (No. 88-15731 (July 10, 1990)), reflects the considered analysis that personnel of the California Tree Fruit Agreement are considered employees of an agency established by the Committees and that one must search for those elements which constitute conduct within the confines of Committee members' official Committee obligations as defined by the terms of the Marketing Orders and regulations issued pursuant to the Agricultural Marketing Agreement Act. Conduct that falls outside the range of activities authorized by the Federal Marketing Order regulations may partake of illegality.

Although the Judicial Officer has indicated a "consolidation" of *Wileman/Kash I* and *Wileman/Kash II*, the latter must be decided on the basis of the record herein as it would be inappropriate to presume that the Judicial Officer, in issuing *Wileman/Kash I*, sought to adjudicate *Wileman/Kash II* without considering the nineteen days of hearing, and thousands of pages of transcript and exhibits. Moreover, it is not known at this time whether the Court of Appeals may decide *Wileman/Kash I* before the Judicial Officer decides *Wileman/Kash II*.

As noted in an earlier part of this decision, great deference has been given to the Judicial Officer's final decision in the *Wileman/Kash I* case.

The subordinate role of the Administrative Law Judge before the Department of Agriculture was set forth by the Judicial Officer in his Ruling on Certified Questions in a number of cases, including that of In re: David Harris, May 1, 1991:

> " * * * In my latest decision in this series of cases (*In re All-Airtransport*, Inc. 50 Agric. Dec. ____, slip op. at 2, * * * I stated:
>
> " * * * This matter has been settled within this Department by the decisions of the Judicial Officer, and the ALJ is required to follow the policy set forth in the decisions of the Judicial Officer, whether it is correct or not * * *.
>
> * * * * *
>
> The Judicial Officer need satisfy only the reviewing courts — not the ALJ's."

However, in order to give him an opportunity to specifically rule upon Findings of Fact, there have been set forth herein those findings which, for a substantial part, were the subject of stipulation or whose contents, from the evidence, can not seriously be disputed, which findings encompass the surrounding circumstances of this case and the grievances from which these Petitioners wish to be relieved. Also, in order to assist the Judicial Officer, and consonant with his prior decision in the *Wileman/Kash I* case, it is recognized that when a court defers to an agency on *statutory interpretation*, it also may ancillarily defer on questions of law and not necessarily fact. Thus, it may become necessary to determine if facts discarded as irrelevant or immaterial should be so regarded. The Federal Court review process can determine where it is inappropriate to assess undue deference to agency decisions and in particular, to those

situations where the agency's power and actions may be dependent upon findings involving statutory interpretation. The Department's power to act, through its Marketing Orders, is dependent on *findings* involving the interpretation and application thereof. Where an agency misapplies the statute upon which its power rests, it may be acting beyond its authority. When subordinates of an agency knowingly or otherwise act beyond their authority, the *proper interpretations* of the regulatory format is not a defense thereto — their conduct has already exceeded that. By misinterpreting a statute, an agency may be tempted to discard Findings of Fact which might otherwise be applicable. Ensuring that agencies remain within the limits of their delegated powers and that they have not misconstrued the laws, has been considered a judicial function. By misinterpreting a statute, an agency may seek to legitimize action which might otherwise be *ultra vires*. Decisions of the United States Supreme Court do not always compel deference to an agency's interpretation of its own statutes and regulations and, sometimes, a different and more independent, judicial attitude is appropriate. The simple fact that the agency has a position has been said to be of only marginal significance. *Mayburg v. Secretary of HHS*, 740 F.2d 100 (1st Cir. 1984). However, I am mindful of the well established principle that a Federal Court will uphold an agency's fact findings if the Court finds that they are supported by substantial evidence. *FTC v. Indiana Fed'n of Dentists*. 476 U.S. 447, 454 (1986). Also, a reviewing Federal Court has the capacity to consider facts disregarded by the Agency. This is to forestall an Agency from picking and choosing only those facts which support its position. Although this standard is deferential to the agency, the Court must review the record as a whole, weighing evidence that supports, as well as detracts from, the agency's determination. *Burhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). Findings of law are subject to *de novo* review with deference to an agency's reasonable

construction of statutes. *Mester Mfg. Co. v. INS*, 879 F.2d 561, 565 (9th Cir. 1989). Also, in the subject case, the Department is not entitled to be accorded deference as to the application of the provisions of the Administrative Procedure Act or the tenets of the Constitution of the United States because those are not areas recognized to be within its expertise. Also, it is well established that without ambiguity the Courts need not accord deference. *Maislin Industries, U.S. Inc. v. Primary Steel Inc.*, 110 S.Ct. 2759 (1990); *Sullivan v. Stroop*, 110 S.Ct. 2499 (1990). These principles take on a substantial importance in the subject case because, as noted above, there exists very little controversy with respect to the aforesaid recited Findings of Fact. Therefore, their rejection or acceptance by the Judicial Officer will be forthcoming from his interpretation of the law which is subject to judicial review. Moreover the Judicial Officer has indicated that when the legality of Order provisions is in question, facts should be alleged and proven. *In re: Conesus Milk Producers*, 88 AMA Docket No. M-2-75 (Dec. 21, 1989). This was done here.

The importance of careful analysis as to who benefits from the assessments, and consequently the Findings of Fact surrounding same, becomes apparent. *See, United States v. Maryland*, 471 F. Supp. 1030 (D.C. Md. 1979).

Inherent in Respondent's argument is that of preclusion of consideration of a number of the issues raised by the Petitioners in their Petition in this proceeding, and the maintenance of the position that the Judicial Officer's decision in *Wileman/Kash I* is *res judicata*. However, a recent case dispels this contention of the Respondent. For instance, the Respondent maintains that by virtue of the Judicial Officer's decision in *Wileman/Kash I*, and the publication for the first time since 1981, of any proposed rule/final rule, there has been created a situation where examination of the basic provisions of the Orders may not be examined prior to

the 1988 rulemaking procedures. In this regard note has been made of *Public Citizen v. Nuclear Regulatory Commission*, (D.C. Cir. April 17, 1990) 3 AdL.3d 1219. Essentially what was decided in that case concerned an agency's action which showed that it was not merely republishing an existent rule in order to propose minor changes to it, but rather was reconsidering the rule and decided to keep it in effect. Thus, challenges to the rule were deemed proper. It was held that if an agency has opened the issue up to a possible new rule, even though not explicitly, its renewed adherence is substantially reviewable. Among the factors which the Circuit Court deemed relevant, but not exhaustive, were the following: Where the agency may have reopened a previously decided issue in a case: (1) the agency proposes to make some changes in its rules or policy; (2) calls for comments only on renewed or changed provisions; (3) but at the same time explains the unchanged, unpublished portion; and (4) responds to at least one comment aimed at the previously decided issue.

In the aforesaid Nuclear Regulatory Commission case the Court of Appeals indicated that the court must look to the entire context of the rulemaking, including all relevant proposals and reaction of the agency, to determine whether an issue was in fact reopened. If, upon such review, it is determined that in proposing a rule the agency uses language that can reasonably be read as an invitation to comment on portions the agency does not explicitly propose to change, or, if, in responding to comments, the agency uses language which shows that it did, in fact, reconsider an issue, a renewed challenge to the underlying rule of policy will be allowed.

When an agency relies on factors, which Congress did not intend that it consider, its decision thereto is flawed and arbitrary and capricious. Moreover, an agency cannot insulate a decision from review by embedding it in a decision on

other matters. *Motor Vehicles Mfrs., Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *MCI Telecommunications Corp. v. Federal Communications Commission* (D.C. Cir. October 23, 1990) (3 AdL.3d 757].

In the latter case the Court of Appeals had occasion to state:

> "* * * An agency does not automatically have to reach every issue whose importance it had noted and on which it had conducted a hearing. *See, e.g., Wisconsin v. FPC*, 303 F2d 380, 386 (DC Cir 1961), *aff'd*, 373 US 294 (1963). *But when it opts not to reach such an issue, the agency must provide an acceptable explanation for its decision — it cannot simply decline to resolve an issue after it holds a hearing. See Minneapolis Gas v. FPC*, 294 F2d 212, 215 (DC Cir 1961). In this case, the only justification the FCC offered for its decision not to reach many of the issues which it had designated for investigation was that it had held the Tariff 12 options unlawful due to the geographic restrictions. *See Reconsideration Order*, 4 FCC Rcd at 7930; FCC Br. at 52. [Footnote omitted]. This justification is inadequate: everyone involved knew, and as the FCC conceded at argument if knew, *see* Tr. at 43, that AT&T would shortly thereafter eliminate the geographical restrictions. It is one thing for the FCC to decline to investigate a tariff in the first place; that decision is entrusted to its unreviewable discretion. It is quite another for it to note the importance of a question concerning a tariff, request and take evidence from the parties, and hold a hearing on the matter, and then "at that point change its mind, wiping out the hearing as though it had never occurred, and in effect decide that it will not enter upon a hearing." *Minneapolis Gas*, 294 F2d at 215. On remand, then, the FCC must reach the issues it designated for investigation unless it provides an adequate explanation for not doing so. (Emphasis added).

* * * * *

We have the impression that there is a certain air of unreality about this case. The FCC (one way or another) will undoubtedly permit AT&T to compete effectively against its competitors in the large user market (if that is what is really involved here). But we are obliged to insist that it do so by turning square corners of administrative law. We accordingly reverse and remand for proceedings not inconsistent with this opinion."

The assessments levied upon Petitioners result from statutory authority given the Secretary of Agriculture. The term "Secretary," as used herein, refers to the Secretary or to any person delegated authority to act for the Secretary. The Petitioners do not challenge this capability. What they do contest are the amounts, methods of ascertainment and approval thereof, and the lack of Administrative Procedure Act adherence, in that:

(1) The assessment process is flawed, and not in accordance with law, because the Secretary of Agriculture does not abide by the Administrative Procedure Act and makes arbitrary, capricious, and unreasoned decisions not premised upon persuasive, substantial evidence available to him;

(2) The assessments levied against them are done, in fact by persons to whom no known delegation has been made and are pro-forma adopted by the Secretary of Agriculture without meaningful systemic or programmatic review and without the opportunity for meaningful input from interested and/or affected parties;

(3) Such assessments are impermissibly retroactive; and

(4) Such assessments are excessive, and beyond the needs of the Marketing Orders, because:

(a) Over fifty percent thereof goes for generic advertising which Petitioners maintain violates their First Amendment rights; and,

(b) Amounts are expended, via an *alter ego*, the Tree Fruit Reserve, which are illegal for the Secretary of Agriculture to make, and thus his decisions with respect to the amount of assessments were unreasonable and arbitrary and capricious.

Activities of California Tree Fruit Agreement

The many decisions, functions, and activities under the Marketing Orders are carried out by the California Tree Fruit Agreement, but as to such personnel-employees there is no published prescription of a course of action for them to follow so as to ascertain if they are acting within the scope of their duties.

The Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, specifically § 552, requires that each Agency:

Shall separately state and currently publish in the Federal Register for the guidance of the public —

(A) descriptions of its central and field organization and the established places at which the employees . . . from whom, and the methods thereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to scope and contents of all papers, reports or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy of interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

"Except to the extent that a person has actual and timely notice of the terms thereof, *a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.* (Emphasis added).

At no time has there been publication of the California Tree Fruit Agreement's existence, its authority, or any of the other requirements listed at § 552(a) of the Administrative Procedure Act, in the Federal Register. This appears to be not unintentional. The only reference ever published in the Federal Register which mentions the California Tree Fruit Agreement is § 917.110 of the Plum Marketing Order, which states that reports, applications, submittals, requests and communications in connection with the Marketing Agreement and Order shall be addressed as follows: "California Tree Fruit Agreement, 701 Fulton Avenue, Sacramento, California 95825."

Nowhere is it published in the Federal Register concerning the California Tree Fruit Agreement's "statements of the general course and methods by which its functions are channelled and determined, including the nature and requirements of all formal and informal procedures available" or the "rules of procedure. . . and contents of all papers, reports or examinations," or its "substantive rules of general applicability adopted as authorized by law, and statements of general policy of interpretations of general applicability formulated and adopted by the agency," or any other requirements contained in Title 5, U.S.C. § 552(a)(1).

Neither the California Tree Fruit Agreement nor the Committees can determine their own authority. *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467 (1980), *cert denied.*, 101 S.Ct. 941; *United States v. Frontier Airlines, Inc.*, 563 F.2d 1008 (1977).

Respondent cannot argue that the California Tree Fruit Agreement Bulletin published every year would suffice. It does not. The growers and handlers do not have input into said Bulletins. In fact, they don't see it until it is published.

There is a strict command in § 552 that an entity's authority must be published in the Federal Register. The California Tree Fruit Agreement issues decisions, opinions, concurrences and orders without ever complying with § 552(ii) of the Administrative Procedure Act, which requires actual and timely notice of the terms thereof. The California Tree Fruit Agreement and its "authority" has never been set forth in the Federal Register, has never been subject to rulemaking, and never subject to scrutiny. As the testimony of record reveals in both *Wileman/Kash I* and *Wileman/Kash II*, those associated with the California Tree Fruit Agreement were somewhat hazy as to the source of their authority and functional basis. Yet, the California Tree Fruit Agreement has taken upon itself to determine assessment levels, notification to handlers of assessments owed and, then, proceeded to collect those assessments. Although sometimes regarded as a non-entity, the California Tree Fruit Agreement imposes upon all handlers subject to Marketing Orders 916 and 917 expense assessments and "generic" advertising assessments. As a matter of fact, the California Tree Fruit Agreement's expenses for running its operation are paid from the expense assessments collected from tree fruit handlers. They have usurped unspecified enforcement power, unspecified judicial power, and unspecified legislative power. Their authority, and their acts, except for routine, ministerial functions, not involving policy

making or substantive administrative determinations lack the force of valid law. *National Labor Relation Board v. Wyman Gordon Co.*, 394 U.S. 759 (1969); *Buschmann v. Schweiker.* 676 F.2d 352 (9th Cir. 1982). The California Tree Fruit agents' powers, duties, as well as their bulletins, have never been scrutinized through any public rulemaking.

There has been an absence of authorization to the California Tree Fruit Agreement. Even if there were some tacit approval or delegation of authority to the California Tree Fruit Agreement, by either the Secretary or by the various Committees, (which there isn't) the Administrative Procedure Act has not been complied with and the California Tree Fruit Agreement's power, authority and actions are without legal basis, except to the extent that the assessments are attributable to inspection and administrative functions.

If one were to adopt the premise that the California Tree Fruit Agreement personnel were acting within the scope of the Secretary's and/or Committee's instructions, directions, and control, then, *the Secretary must be held responsible for their actions, including the utilization of their alter ego, the Tree Fruit Reserve*, the latter of which engaged in conduct which *admittedly* was illegal for the Secretary to perform.

Respondent would negate the above view principally on the basis that the Secretary's power to approve or disprove of actions of the Committees and their staff is all that is required and that retention of ultimate authority in the Secretary is sufficient to ignore the mandate of the Administrative Procedure Act. Such contention is also premised upon the faulty premise that, "No rulemaking authority has been delegated to or undertaken by the CTFA." The evidence clearly shows that, from a realistic viewpoint, this is not so. The "running" of the Orders is and was left by the Committeemen to the California Tree Fruit Agreement, whose decisions, judgments, determinations, and rules became the law to the extent that the filing of a

§ (15)(A) Petition — a right given handlers by Congress — could be viewed as an attack on the California Tree Fruit Agreement! Subordinates acquired and/or assumed policy level discretion. The California Tree Fruit Agreement has no statutory duties under either the Agricultural Marketing Agreement Act or the Administrative Procedure Act. The Secretary of Agriculture and the Committeemen do. It is incumbent upon them to assure that the Orders are applied, construed and functioning in accordance with law and that the Secretary's delegatees or employees are acting within the scope of their duties and not beyond carefully defined limits. The California Tree Fruit Agreement's functions transcended the "operational" aspects into the realm of substantive, discretionary acts.

The Federal Advisory Committee Act

"Open meetings" statutes, also called Sunshine laws, are designed to make the governmental process open to public inspection. When Congress enacted the Sunshine Act in 1976, it reflected the feeling that greater accountability would increase the public's confidence in the understanding of the decisionmaking process (5 U.S.C. § 552(b)).

The Sunshine Act parallels open meeting provisions that are currently in force in all fifty (50) states. California has such an Act, called the Brown Act (California Government Code § 54950, *et seq.*) but the scope and/or applicability of that Act will not be the subject of determination herein.

The Sunshine Act requires the agency to be headed by a "collegial body" of not less than two (2) members, the majority of whom are appointed by the President and confirmed by the Senate. The Nectarine, Plum and Peach Commodity Committees, as they are not appointed by the President or confirmed by the Senate cannot be considered as governed by the Sunshine Act. However, *Blackwell College of Business v. Attorney General*, 454 F.2d 928

(1971), applied the Sunshine Act to the I.N.S., which also did not fit within the category declared by the provisions of the Sunshine Act.

Congress enacted the Federal Advisory Committee Act (FACA) in 1972, after it was determined that there were numerous Committees, boards and similar groups that had been established to advise Officers and agencies in the executive branch of the Federal Government. Congress felt that although these Committees and boards were frequently used and beneficial in furnishing expert advice, there was a need to put their determinations "in the Sunshine" as well. In order to fall within the provisions of the Federal Advisory Committee Act, the term "Advisory Committee" relates to any Committee, subcommittee or sub-group thereof which is ". . . (C) established or utilized by one (1) or more agencies." The term "agency" has the same meaning as in 5 U.S.C. § 551(i).

Although the Federal Advisory Committee Act is intended to apply to Advisory Committees, it is not intended to apply to all amorphous, *ad hoc* group meetings; only groups having some sort of established structure and defined purpose constitute "Advisory Committees" within the meaning of the Act. *Nador v. Barrody*, 396 F. Supp. 1231 (1975). The Nectarine Administrative Committee, the Plum Commodity Committee, the Peach Commodity Committee, and the California Tree Fruit Agreement (were it a viable legal entity — which it is not) are Committees and bodies that fit within the parameters of the Federal Advisory Committee Act. *Aviation Consumer Action Project, et. al. v. Washburn*, 535 F.2d 101 (D.C. Cir. 1976). It is upon data and information that is gathered by the Committees that they base their recommendation to the Secretary.

Pursuant to § 10(a) of the Federal Advisory Committee Act: (i) each Advisory Committee meeting shall be open to the public, (ii) there must be timely notice of each such

meeting and it shall be published in the Federal Register, and they shall also provide other forms of notice to insure that all interested persons are notified of such meetings prior thereto; and, (iii) interested persons shall be permitted to attend, appear before, or file statements with any Advisory Committee.

The function of each advisory Committee is that of an advisor only, and all matters under their reconsideration should be determined, in accordance with law, by the official, agency, or officer involved. (FACA § 9(b)). "Unless otherwise specifically provided, . . . advisory committees shall be utilized solely for advisory functions." (FACA § 9(b)):

> "No advisory committee shall meet or take any action until an advisory committee charter has been filed with (i) the administrator. . . or (ii) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency."

As to the actual meetings taking place pursuant to the Federal Advisory Committee Act, detailed minutes of each such meeting must be kept and shall contain a record of the persons present, a complete and accurate description of the matters discussed and conclusions reached and copies of all reports received, issued or approved by the Advisory Committee. Further, the accuracy of all minutes shall be certified by the Chairman of the Advisory Committee. (FACA § 10(c)).

If the head of the agency to whom the Advisory Committee reports determines that certain portions of some meetings may be closed to the public, such determination shall be in writing and shall contain the reasons for such determination. The Advisory Committee shall not hold any

meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and with an agenda approved by such officer or employee.

Since § 2(6) of the Federal Advisory Committees can be advisory only, and that all matters under their consideration should be determined in accordance with law (similar to the recommendation to the Secretary of Agriculture for approval of a rule or regulation for the Nectarine, Plum or Peach Marketing Orders), any actions taken by the Committees changing the law are null and void. If the Federal Advisory Committee Act permits the Committees to only advise, their enactment of substantive law must be null and void. The Secretary, through inaction and non-disapproval cannot make legal that which has its roots in non-compliance in the first place. In the instant case, there was no intent to comply with the Federal Advisory Committee Act. Yet, these various Commodity Committees had their greatest impact on the handlers/growers through their proposals and recommendations to the Secretary since they did not participate on a day to day basis in the actual ministerial operations of the Orders, such as inspections, over-seeing staff personnel, collecting assessments, paying bills. Their advisory role took on paramount importance. It can be discerned that their status partakes of a hybrid situation. The Committee meetings were attended by the Department's representative, who, in turn, relayed information to the Secretary, apart from the Committees' advice and recommendations.

Wileman/Kash proved at the hearing that the Chairmen of the Nectarine, Plum and Peach Commodity Committees, along with their "friends" on the various Committees, as well as the personnel of the California Tree Fruit Agreement have attempted to avoid the provisions of the Federal Advisory Committee Act by conducting the business of the

Commodity Committees in private session. The Commodity Committee members use their "alter ego" private non-profit corporation to discuss and determine the future, each season, of the tree fruit industry.

All the issues which should be raised at the "open" and "public" commodity meetings, are instead discussed, evaluated and decisions made in clandestine meetings under the guise of corporate meetings of the Tree Fruit Reserve. Decisions are made affecting the entire tree fruit industry, without the necessity of complying with Federal law. Thus, when the Committees meet at the annual public meetings, a stage play is presented. The Committees go through the motions of appearing to discuss the issues. However, all decisions have previously been arrived at in the Tree Fruit Reserve corporate meetings. Although the meetings of the Executive Committee of the Tree Fruit Reserve were generally held in conjunction with the Management Services Committee meetings, which Respondent argues were "open," the industry was not advised that the meetings were scheduled. These meetings always took place the day before the annual Commodity Committee meetings conducted in the spring and fall. Oftentimes, the Minutes would only reflect that the meetings were of the Management Services Committee. However, a review of those Minutes clarifies that at each such commodity meeting, there were tie-ins with the Tree Fruit Reserve whether the Executive Committee of the Tree Fruit Reserve was referenced in the heading of that meeting or not. Each such meeting included discussion of the Tree Fruit Reserve. Each individual attending the Management Services meeting was a member of the Executive Committee of the Tree Fruit Reserve (see, Exhibit Nos. 132-168) (Appendix "A", Respondent's Stipulated Response). Controversial issues were raised and discussed at the Tree Fruit Reserve gatherings and those present would be advised not to raise those issues at the

annual commodity meetings, where unanimity of opinion was promoted.

It cannot be the law in the United States that Federal Committees, such as the Nectarine, Plum and Peach Committees, that ostensibly recommend rules to the Government, can meet "in the dark" and make laws that have a substantial impact upon people with whom Wileman/Kash and others compete.

Although in *Wileman/Kash I*, the Judicial Officer stated that the Federal Advisory Committee Act is not applicable to the Committees administering the Marketing Order programs, such assertion was *dicta*. Specifically, the Judicial Officer stated:

> "Petitioners contend that the Committees and Maturity Subcommittees failed to comply with the Federal Advisory Committee Act, which requires that committee meetings be open to the public, with timely notice published in the Federal Register (Act of Oct. 6, 1972, Pub. L.No. 92-463, 86 Stat. 770 (1972), as amended, *reprinted in 5* U.S.C. app. at 1175 (1988)). *However, no issue was raised in the petition or amended petition as to the Federal Advisory Committee Act and, therefore, the issue cannot be considered in this proceeding (§ II(A))*. But even if the issue could be raised, that statute applies to advisory committees — not to committees with operational responsibilities. * * * " (Emphasis added).

The Judicial Officer's *dicta* was premised upon his finding that the role of the Committees was that of day to day operations which included crop estimation, monitoring seasonal production; contracting and interacting with inspection personnel; developing, reviewing and contracting for research and advertising; extensive recordkeeping and gathering and disseminating statistical material, etc. The Judicial Officer believed that the Committees' functions in making

recommendations to the Secretary " * * * is clearly something *secondary* that is incidental to and inseparable from their operational functions. It is for this reason that the administrative committees under Federal Marketing Orders are not subject to the Federal Advisory Committee Act." Clearly, the Judicial Officer's approach in this regard depends upon how one views the "operational" and "recommendational" aspects of the Committees. Although the Judicial Officer believed the issue was not presented in *Wileman/Kash I*, it is clearly presented herein, and, the extent to which the Judicial Officer will follow his own *dicta* in view of the record herein is not known. Whether or not the Federal Advisory Committee Act is applicable to the circumstances of the Commodity Committees is not a determining factor in this decision. It is noted, however, that if the Act is applicable to the Department, section 552b(h) requires that a suit must be filed in a Federal District Court within at least sixty (60) days of the meeting at which the alleged violation occurred.

When the Commodity Committees met during the period 1980-1987 to set the color chip standards for the following year, there was industry domination by a few and an economic concentration of power reflected in the conduct of the members of the Tree Fruit Reserve.

Wileman/Kash established, at the hearing, that the Maturity Sub-committees although they could, do not in actuality establish and recommend the color chip designations for each upcoming tree fruit season. Realistically those determinations are made by the California Tree Fruit Agreement and/or the Tree Fruit Reserve. As a matter of fact, all determinations relating to the tree fruit industry are made at the joint Management Services and Tree Fruit Reserve meetings.

A review of some of the Minutes of meetings held in the early 1980's sheds light on why the Committees failed to

seek the authorization of the Secretary prior to the implementation of the "well-matured" maturity standard. It is apparent that no studies or reports were ever conducted with respect to establishing guidelines for the implementation of the "well-matured" maturity standard. The Committees merely made up the rules as they went along. For example, an excerpt from the November 17, 1981, Minutes reads:

> "Mr. Rasmussen [Chairman of the Plum Committee] asked whether a provision requiring 90% of the fruit to meet the standards would be acceptable. Mr. Van Sickle thought it would work on some varieties and that the industry could possibly try it for one year with committees appointed to set the standards which could be adjusted throughout the year. Mr. Giannini [Chairman of the Nectarine Committee] stated that in nectarines, 10% of the surface did not necessarily have to meet the color requirements and in addition, 10% of the fruit in the box can be under the maturity requirements. . . . If it proved that the maturity standards were too stringent, they could be reduced." (Exhibit No. 141).

These individuals, who ran the tree fruit industry, had no intention of conducting their business in "open" and "public" meetings. In fact, it is clear that they did not intend to advise the Secretary of Agriculture of their actions, at least while they continued to experiment in molding the industry to meet their objectives. A review of the Minutes of the May 4, 1982, Management Services Committee meeting exemplifies the intent of this experimentation and the Committee Chairmens' position that the Secretary had no "need to know":

> "Mr. Rasmusson [Chairman of the Plum Committee] commented that he was recently criticized for the maturity standards in effect during 1981 and suggested that standards be locked into regulations with changes to be made by the full committee at the Fall meetings and

instituted in the following year. After additional discussion, Mr. Geller [Manager of CTFA] stated that *it may not be advisable to lock in color standards in the Bulletin as they would-be difficult to change in the future.*... Mr. Giannini [Chairman of the Nectarine Administration Committee] commented that new nectarine varieties being regulated and others assigned of the number 24 (M) color chip, would need review during the season, and although he agreed that good communication is necessary, *he did not feel it is advisable to put specific color requirements in the Bulletin*...

Mr. Geller asked for additional comments to clarify a procedure for establishing and changing maturity standards. He suggested that when maturity is increased, a more formal procedure should be applied than if it were to decrease. Mr. Giannini suggested that the full committees handle changes up or down but that the standards must be flexible and recognize the individuality of each season.... Mr. Geller further suggested that Kim Botkin [Supervisor, SPI] and Mr. Van Sickle [Field Representative, CTFA] be authorized to observe the orchards and varieties in question and then determine if the full committees should be called. This would prevent the full committee from becoming a 'wailing wall.'" (Exhibit No. 142).

It is apparent from the reading of the Minutes (Exhibit Nos. 132 through 167) that the Committees had no intention of discussing the implementation of their new "well-matured" standard with the Secretary of Agriculture. No reference is made to referring any of the rules and regulations, put in place by the Committees to control the tree fruit industry, to the Secretary of Agriculture. In fact, the above-referenced Exhibit No. 142 expressly points out that it was not their intent, at that time, to inform even the handlers and growers of their actions. The method established for advising the industry of regulation changes is

through the Bulletins and the "industry giants" determined that it was not in their best interests to publish the color standards in the Bulletins "as they would be difficult to change in the future." The Bulletins referred to are the Peach, Plum and Nectarine Bulletins published by the California Tree Fruit Agreement for distribution to the handlers and growers. These are *not* official government publications, but merely information devices.

In addition, there was testimonial evidence at the hearing that the Committees did not abide by the "Sunshine" laws because they did not believe them applicable.

It was indicated in *Pacific Legal Foundation v. Counsel on Environmental Quality,* 636 F.2d 1259 (1980) that requirement of application of the Sunshine's laws did not require the agency to hold meetings in order to function, but where deliberations and discussions among agency members in fact determined or resulted in joint conduct or disposition of official agency business, they were "meetings" to which open meeting rules applied, no matter how the agency might categorized them for its own internal purposes.

Certainly these Committees and/or the California Tree Fruit Agreement had day to day operational duties, carried out mostly by employees. However, inherent in their powers and duties was that of *reporting and recommending* to the Secretary. This *includes recommendations as to the rate of assessments* - few functions could take on greater importance to these Petitioners and others. Their functions and responsibilities fall within the parameters of the Federal Advisory Committee Act.

Application of the Administrative Procedure Act

Based upon the extensive evidence herein, I find that the Secretary's failure to provide an appropriate 30-day notice and comment period with respect to rulemaking was not justified; that nearly automatic approval of the Committee's recommendations without opportunity for participation by

interested persons deprived Petitioners of substantive rights; that failure to adequately review budget proposals and to allow meaningful participation by interested persons resulted in higher assessments than necessary and the expenditure of assessment funds for activities illegal to the Secretary. In addition there was unnecessary and impermissible retroactivity as to the assessments. Although the Department's procedures permitted the imposition of forced paid "generic" advertising monies which allegedly violate Petitioners Constitutional rights, this last contention is not necessary to decide herein because the Petitioners are entitled to prevail on administrative statutory grounds.

The Courts have repeatedly recognized that Congress authorized the Secretary of Agriculture to review initially all challenges by handlers to Marketing Orders including those raising Constitutional concerns. In fact, he must do so before handlers can seek Judicial redress. Whether or not an order, or its provision, is or is not in accordance with law involves questions of law, albeit formulated in Constitutional terms, arising out of, or entwined with, factors that call for an understanding of the industry regulated. Thus, the remedy, in the first instance derives from the Secretary and his ruling and the elucidation which he gives thereto.

Summarization of Constitutional Issues

The Petitioners herein have raised a number of Constitutional issues. Since, in my view, their pursuit of administrative remedies results in relief on non-constitutional grounds I shall follow the prudential consideration of not reaching the Constitutional questions.

However, if Petitioners were not to succeed on the merits of their Administrative Procedure Act posture, then further consideration must be accorded their claim for denial of First Amendment rights, which is discussed more fully hereinafter. Summarized, their position is that the Agricultural Marketing Agreement Act permits the Secretary to collect assessments from handlers regulated under a Marketing Order for purposes of any form of advertising (7 U.S.C. § 608(6)(I)). 'The Secretary, adopting the preferences of the Nectarine, Plum and Peach Committees, through the California Tree Fruit Agreement, has opted for the use of "generic" rather than brand name specific advertising. Wileman/Kash assert that to compel them to provide financial support for the advancement of any economic, ideologic and/or commercial beliefs, particularly those with which they disagree, violates their Constitutional right of freedom of speech and association, both as individuals and in the commercial setting.

Approximately $.09 to $.10 per carton for Nectarines, Peaches and Plums is being assessed by the various Committees (through the California Tree Fruit Agreement) for the purpose of promoting "generic" advertising. This amounts to in excess of 50 percent of the assessments imposed and collected for funding the budgets of the respective Committees. These funds are then expended to promote philosophic, economic, ideologic and commercial beliefs to which Wileman/Kash do not subscribe.

Also, both parties have likewise addressed the issue of whether Congress has attempted to delegate to the Secretary of Agriculture unfettered discretion to impose taxes, thus involving Article 1, Section 8, Clause 1 of the United States Constitution which sets forth:

> "The Congress shall have the Power To lay and collect Taxes . . . but all Duties, Imports, and Excises shall be uniform throughout the United States;"

The fees (assessments) which are imposed undisputedly benefit others than those from whom they are extracted. Whether they are more like a tax because they provide money for projects that benefit the general public is open to

question, although they benefit the foreign tree fruit industry and the industry nationwide, retailers and wholesalers. They also assist the general consumer nationwide in being able to select desirable tree fruits. In other words, Petitioners are forced to fund the activities and economic enhancement of others to their own detriment.

Again, this raises a Constitutional issue of whether there has been a forbidden delegation of legislative power, lacking established guidelines and limitations by which the person or body authorized to fix such rates is directed to conform. The Secretary's actions in imposing assessments must be "reasonable" and although this is a vague standard, a Federal Court would not necessarily shy away from the ascertainment thereof in an appropriate case. I shall not do so here because it is not required.

If it were, I would note with respect to the Judicial Officer's assertion in *Wileman/Kash I* that, " * * * petitioners rely on antiquated and in apposite cases involving delegations of authority to make law (e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)) * * *," that there is a recent case reflecting very careful and thoughtful study by the Tenth Circuit of what was found to be therein an unconstitutional delegation of legislative powers to the Attorney General. *United States v. Widdowson* (10th Cir. Oct. 15, 1990) (3 AdL.3d 536). Included in its opinion:

> "Separation of powers as doctrine may appear to be moribund, but we do not agree with those who think it is dead. The Supreme Court recently relied on the separation of powers doctrine to strike down the one-House veto in *INS v. Chadha*, 462 US 919 (1983), and to hold Section 251 of the Gramm-Rudman-Hollings Act unconstitutional in *Bowsher v. Synar*, 478 US 714 (1986). Even more recently, the Court recognized that 'the integrity and maintenance of the system of government ordained

> by the Constitution,' mandate that Congress generally cannot delegate its legislative power to another Branch. *Mistretta v. United States*, 109 S Ct 647, 654 (1989) (quoting *Field v. Clark*, 143 US 649, 692, 12 S Ct 495, 504, 36 L Ed 294 (1892)).
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> None of these limitations or safeguards is present in Section 811(h). The nation's chief law enforcement officer makes the law he is to enforce. In determining that a drug must be scheduled temporarily because it poses 'an imminent hazard to the public safety,' the Attorney General is charged to consider the drug's history and current pattern of abuse, the scope and significance of that abuse and potential risks to the public health. *See* 21 USC § 811(h)(1), (3). But he need not follow any scientific advice, he need not hold any hearings — just give thirty days notice in the Federal Register, *id.* Section 811(h)(1) — and his decision, by explicit statutory command, *id.* Section 811(h)(6), is not subject to judicial review. In other words, the Attorney General acts with unfettered discretion when making temporary scheduling decisions; he could add a substance as innocuous as aspirin to Schedule I and his decision could not be challenged.
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> * * * * *
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> Court decisions have given significant latitude to Congressional delegations to regulate complex, rapidly changing, important activities or products. Certainly harmful drugs is such an area. But we think the instant delegation goes beyond any that have been upheld. Although the authority of *Schechter* may be in doubt in many respects, it was surely correct in stating that although '[e]xtraordinary conditions may call for extraordinary remedies . . . [e]xtraordinary conditions do not create or

enlarge constitutional power.' *Schechter*, 295 US at 528 (footnote omitted). Like Judge Hutchinson, we believe that '[i]f this delegation is constitutional, . . . any individual protection provided by the constitutional prohibition against a general delegation of legislative power is a relic of the past.' *Touby*, 909 F2d at ____ (Hutchinson, J., dissenting). Like him, we are 'unwilling to consign it to the museum until the Supreme Court so decides.' " *Id.*

Assessments, the California Tree Fruit Agreement and the Tree Fruit Reserve

Actually, the nexus between the Tree Fruit Reserve and the Marketing Orders is found in the approval process of the Secretary of Agriculture as to the amount of needed and reasonable expenditures, and the need for him to comply with the Administrative Procedure Act as to his determination of the amount and purpose of expenditures and assessments. In his oversight capacity he, indeed, was aware of the Tree Fruit Reserve and condoned and fostered that entity's engaging in acts which were illegal to him. There was never any notification in the Federal Register or in the Marketing Orders of the relationship between the Tree Fruit Reserve and the California Tree Fruit Agreement. Since the Committee Chairmen and the Secretary of Agriculture knew of the Tree Fruit Reserve and its activities, then it must follow that he (the Secretary) failed to determine whether the assessments were excessive or not. If they were beyond the reasonable needs of the Committees they would be unauthorized. There is no such determination in the approval process. (Ex. No. 297). Mr. Kimmel, certainly a knowledgeable witness as to the Secretary's practices, and what he expects, clearly demonstrated the shallowness of the approval for expenditures, upon which the assessments are

based and paid. For instance, he testified, among other things, that:

"A. I really don't believe that the secretary engages in the decision of how the committees will finance their purchases. Whether or not those purchases are made by CTFA or by the Tree Fruit Reserve and rented or what. If they are determined to be necessary and appropriate expenditures, the secretary would approve. * * *" (Tr. 2728).

There is much documentary evidence reflecting surplus funds available to the Tree Fruit Reserve to pay for lobbying efforts and attorney's fees. Except for those associated with the Tree Fruit Reserve, others affected had no opportunity for input.

The Respondent would have consideration of the operation of the Tree Fruit Reserve precluded supposedly because it is an alleged separate non-profit corporation, but then argues that the relationship between the Tree Fruit Reserve and the Marketing Orders is in accordance with law. The basic thrust of the Respondent is that the Petitioners have cited no authority that:

"* * * provides that a handler need not pay his lawfully levied assessments *merely because there is found to be some misfeasance by those responsible for administering or spending such funds.* When taxpayer funds are illegally spent or lost through misfeasance or incompetency by the Defense Department or the Interior Department, every taxpayer does not suddenly get a refund, or receive a dispensation from paying taxes. Petitioners never prove why their position would be any different.

In addition, petitioners fail to consider that it is undisputed that the Tree Fruit Reserve received only $77,522 from the marketing orders in the year ending February 28, 1989, (Exhibit 204, pages 3 and 7). The amount in prior

years was much smaller (Exhibits 176-203). This amount is less than 1% of the assessments of the marketing orders (Exhibits 255(C), (D), (E)). [Footnote omitted]. Therefore, even if all such funds were found to have been stolen or illegally spent, they would at most justify a less than 1% reduction in petitioners' assessment bill."

Among Respondent's admission are those of:

"* * * The Tree Fruit Reserve apparently has on its own also engaged in activities which the committees are unauthorized to do (*e.g.*, lobbying Congress regarding import legislation). * * *

* * * * *

It is also undisputed that many, at least, of the officers and Board of Directors of the Tree Fruit Reserve are members of one or more of the marketing order committees. Because of this fact, Tree Fruit Reserve meetings have been held in conjunction with committee meetings and, for a period of years, joint minutes were kept." (Exhs. 149-163).

Respondent maintains that the California Tree Fruit Agreement received value obtained from the rental arrangements of the Tree Fruit Reserve and that:

"* * * all of the funds are in the nature of rent for the Sacramento office, for automobiles, or for office equipment and furniture. (Exhs. 203-204). In total they constitute less than 1% of the budget of the marketing order committees. Even, *arguendo*, if all such payments were found to be unauthorized and reprehensible, they still are of such minor impact on the marketing orders' budget that they cannot justify petitioners' failure to pay their assessments. * * *"

Obviously, those concerned and associated with the Tree Fruit Reserve were reluctant to give testimony relating to its

activities. Much of the foregoing has been premised upon subpoenaed documentary evidentiary data, although Mr. Kurt Kimmel, Agricultural Marketing Services' field representative, stationed in Fresno since 1986, has, among his duties the reporting back, "from Washington to the Committees" regarding policy and communications in general (Tr. 2694) and he represents the Department of Agriculture at meetings of the Committees (Tr. 2693), and supervises Commodity Committee meetings. (Tr. 2702). He described how Washington was concerned that the California Tree Fruit Agreement was doing services for the Tree Fruit Reserve gratuitously. (Tr. 2703, 2704). Prior to early 1988, Mr. Kimmel attended the joint meetings with the Executive Board of the Tree Fruit Reserve. (Tr. 2705). He acknowledged the likelihood that had the California Tree Fruit Agreement bought its own building, the assessments could be less. (Tr. 2733-2734). Because the California Tree Fruit Agreement and the Tree Fruit Reserve were not treated as separate entities, it is difficult to find explanation for various discrepancies such as appear in the Tree Fruit Reserve's filing of their annual IRS Form 990 (Tax Return of An Organization Exempt From Income Tax). Mrs. Rau, a CPA with Grant Bennett Associates in Sacramento, testified that she has been personally involved in the preparation of the tax returns and the yearly financial audits of the California Tree Fruit Agreement, the Nectarine Committee, the Plum Committee, the Peach Committee and the Tree Fruit Reserve, since 1983. (Tr. 59-62). Mrs. Rau testified that she has the responsibility of verifying, as part of the audit, that the corporate responsibilities of the corporations are met, Minutes are kept, etc.. In her opinion, the records of the organizations have been normally and properly maintained. (Tr. 63-65).

Although Respondent argues that the Tree Fruit Reserve is a private corporation which is unrelated to the Commodity Committees and/or the California Tree Fruit Agree-

ment, Mrs. Rau has specifically found, in her preparation of the financial statements on behalf of the Tree Fruit Reserve that: "*The Tree Fruit Reserve and the California Tree Fruit Agreement are affiliated non-profit organizations: the Tree Fruit Reserve receives all of its operational revenues from the California Tree Fruit Agreement in the form of rents. These amounts arise from related party transactions with the California Tree Fruit Agreement.* (Ex. 204). In spite of her acknowledgement, in the Tree Fruit Reserve financial statement, of the interrelationship between the Tree Fruit Reserve and the California Tree Fruit Reserve, Mrs. Rau failed to provide this same information to the Internal Revenue Service. For example, with respect to page 4 of the IRS Form 990, submitted on behalf of the Tree Fruit Reserve, several discrepancies exist which to date go unexplained. Although Mrs. Rau states that ". . . The Tree Fruit Reserve and the California Tree Fruit Agreement are affiliated non-profit organizations," she *denies* on the IRS Form 990 that the *Tree Fruit Reserve is interrelated with any other organization.* (Ex. Nos. 272-296).

Although on the financial statement of the Tree Fruit Reserve for the fiscal year ended February 28, 1989, there is acknowledged a contribution to the California Grape and Tree Fruit League to support the Alliance for Food & Fibre of counter pesticide legislation (Ex. No. 204), Mrs. Rau denies on the IRS Form 990 that any amounts were spent in attempts to influence public opinion about legislative matters or referenda. (Ex. No. 272). This directly contradicts the entry in the financial statement.

Although the 1988-1989 financial statement for the Tree Fruit Reserve, as prepared by Mrs. Rau, sets forth $5,437 as "other income" generated from disposal of assets, interest, and other income, during the 1988-1989 fiscal year (Ex. 204), Mrs. Rau denies on the Form that the Tree Fruit

Reserve generated in excess of $1,000 in unrelated income during this time frame. (Ex. 272).

Although it was testified that the computer and press purchased by the California Tree Fruit Agreement in 1986 was transferred to the Tree Fruit Reserve for little or no remuneration in 1987 (Tr. 3463), the IRS Form 990 prepared by Mrs. Rau, fails to reflect that the organization received donated services or the use of materials, equipment or facilities at no charge or substantially less than fair rental value. (Ex. Nos. 272-275).

The financial statements of the Tree Fruit Reserve, for each season, when compared to the IRS Form 990 for the corresponding fiscal year, are inconsistent with one another.

There is an intertwinement between the California Tree Fruit Agreement personnel and the Tree Fruit Reserve and a dependency of operation that negates arms-length dealings. Both entities have been considered one and the same.

Even as late as February 28, 1989, the professional accounting firm, employed by both the California Tree Fruit Agreement and the Tree Fruit Reserve stated:

> "Tree Fruit Reserve and California Tree Fruit Agreement (C.T.F.A.) are affiliated nonprofit organizations. Tree Fruit Reserve receives all its operational revenue from C.T.F.A. in the form of rent on buildings, automobiles, office equipment and furniture." (Ex. 204, p. 7).

There is a commonality, a sameness, attached to their Board of Directors, their meetings, to their Minutes, and their use of the same accounting firm. This coziness permitted the absence of the Tree Fruit Reserve's Board of Directors' Minutes for eight years; the lack of written rental arrangements, leases of cars, leases of furniture and apparent failure to comply with California law as to amendments to its Charter and/or By-laws. Discussions relating to the operation of the Tree Fruit Reserve and Marketing Order provi-

sions relating to the operation of each entity are mutually discussed within the framework of these common organizations.

In the absence of arms'-length dealings there are circumstances of potential and/or actual conflict of interests. The profits generated by the Tree Fruit Reserve, from the use of handler assessment monies, are used to promote special interests of the various Commodity Committeemen. The appointment of individuals, to Committees of the various Commodities, by the Secretary of Agriculture is a high calling. It is one of trust and responsibility, and the duties and responsibilities of Committee members and Committee Chairmen may not be viewed lightly because the Secretary of Agriculture has entrusted to such persons the lofty positions they occupy and he expects their authority to be exercised in a manner reflective of the Secretary's own responsibilities and judgment.

This was not done here, because it was illegal for the members of the Peach, Plum and Nectarine Commodity Committees to spend handler assessment monies through the Tree Fruit Reserve for activities which transcend the questionable to the illegal. Such "schemes" and "shams," maintained a facade under the color of law to avoid the Secretary's regulations and Congress' intent in establishing the Agricultural Marketing Agreement Act. It is doubtful that the various Committee Chairmen could have utilized a partnership arrangement, among themselves, to have operated in the same manner as the Tree Fruit Reserve, or to have so acted in their individual capacities. Uncertainty as to the capacity in which a Committeeman may have been acting at any given time became a guessing game. The *Chairmen of the respective Peach, Plum and Nectarine Committees and the Chairman of the Control Committee are automatically on the Board of Directors* of the Tree Fruit Reserve and are one and the same.

The Commodity Committee members had no official duty to be part of and/or to condone a little known (if known at all by industry members), alleged private non-profit corporation, the operations and actions of which were sought to be separated from the Department of Agriculture by achieving a cosmetic facade to create the illusion of separateness. Mr. Kimmel, Agricultural Marketing Services' representative testified that theTree Fruit Reserve was no secret to the Department of Agriculture, but may not have been known to growers and others.

This duality of purpose of the Committeemen provides fertile ground for such persons to engage in tactics to restrain their competitors and, at the same time, increase production and marketing of their own produce or that of their friends. Little thought has been given to conflict of interest and less than *bona fide* arms'-length inter-related business transactions.

The Commodity Committee members, including their respective Chairmen, directly or by subterfuge, when acting in a dual capacity, one of which was contrary to the Agricultural Marketing Agreement Act and the Administrative Procedure Act, violate the laws and may not claim exemption from such liability. Some growers and handlers, particularly the smaller ones, may not be represented at all or, if represented, very poorly. Their property rights are not protected when the Committee members, on behalf of the Secretary, in the trusted position of a Committee member, subject to the Secretary's supervision, delegation and approval, dons the hat of a member of the Board of Directors of the Tree Fruit Reserve, who's interests may be, and often is, contrary to the interests of others in the same business.

Wileman/Kash proved that the annual Commodity Committee meetings required by law to be open and public, are a sham. The evidence showed that the Officers and members of the Tree Fruit Reserve (which includes the Commodity

Committee Chairmen, the members of the Commodity Committees and persons representing the California Tree Fruit Agreement) in non-public meetings (which remain unpublished), secretly controlled the tree fruit industry. Key issues were discussed, evaluated and voted on in private clandestine meetings obscured from public scrutiny. What remained to be accomplished at the "open" and "public" Commodity Committee meetings misled the remainder of the tree fruit industry into believing that decisions were being dealt with openly, honestly and fairly. Such was not the case.

However, overshadowing all other activities of the Tree Fruit Reserve, are those which strike at the very heart of the Agricultural Marketing Agreement Act: namely, knowing evasion of its prohibitions.

No attempt is made herein to pass upon the corporate affairs or determine the legal liability, if any, of the Tree Fruit Reserve's possible failure to report unrelated taxable income, its interlocking directorates, and the transfer of the computer and/or other assets from the tree fruit industry. The disinclination to pass upon corporate affairs of the California non-profit corporation is in accord with *RCM Securities Fund, Inc. v. Stanton*, (2nd Cir. No. 90-7047 (March 26, 1991); *Burks v. Lasker*, 441 U.S. 471 (1979). The fact that the Tree Fruit Reserve supports and funds activities not authorized pursuant to the Agricultural Marketing Agreement Act, is a matter of concern to the Secretary of Agriculture.

The direction and purpose of the Tree Fruit Reserve could not be achieved by the Committee Chairmen as individuals. They could not have met together, as individuals, and decided to obtain handler assessment moneys for lobbying activities and attorneys fees.

Hiding from view, within the confines of the Tree Fruit Reserve corporation, does not alter the responsibilities and duties of the Secretary of Agriculture, nor his Committee members whom he appoints and their Chairmen. The cloak of Marketing Orders is not a shield to circumvent the Agricultural Marketing Agreement Act.

The California Tree Fruit Agreement acting through its "alter-ego," the Tree Fruit Reserve, has unlawfully spent assessments on lobbying.

The California Tree Fruit Agreement acting through its "alter-ego," the Tree Fruit Reserve, has unlawfully spent assessments on retaining attorneys to represent private individuals in direct conflict with the interests of Petitioners.

The Department of Agriculture frequently pierces the corporate veil. This should be done here. The corporate shell is not sufficient to shield the Committee Chairmen from their duties pursuant to the Marketing Orders nor is it strong enough to allow the Secretary of Agriculture to ignore the Administrative Procedure Act in the determinations pertaining to the approval process as to the amount of involuntary assessments which each handler must remit.

Although relating to the achievement of a monopoly position, the Courts have recognized that only the precise activities authorized or required by an Order are legal, and practices not literally legitimized by an Order or an activity carried out "under the cover" of Federal Marketing Orders are subject to scrutiny. *See, Marketing Assistance Plan, Inc. v. Associated Milk Producer, Inc.*, 338 F. Supp. 1019 (1972) where a discrete group of citrus growers owned three related cooperatives performing different marketing functions. The U.S. Supreme Court regarded all three essentially one entity, with any differences being *de minimis. Sunkist Growers, Inc. v. Winekler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

The 1988 Regulations

The Administrative Procedure Act was not followed with respect to implementing the "laws" through the publication, was for the first time in eight years, of Regulations. Petitioners' complaints and grievances illustrate the paradox in which they find themselves. The promulgation of the Interim Final Rules indicates that although the Secretary received quite a few comments from commentaries, nevertheless, the Secretary made findings and determinations either at odds with existing data, or he ignored or failed to elucidate on those comments which were not persuasive to his purposes. Although these Petitioners fall within the scope of the regulated handlers, nevertheless, unless they can find a legal avenue within which to contest these matters, they are essentially without a remedy. This is particularly true if one were to adopt the Respondent's position that one cannot question (as opposed to second guessing) the Secretary's determinations.

Because of the frustration resulting from the inherent immobility of the system whereby an aggrieved Handler/Petitioner can obtain an adjudication as to his grievance, these Petitioners have pursued various legal positions in their Petition filed with respect to the 1988 and 1989 harvest seasons — which positions overlap to a certain extent but not totally with the allegations and arguments set forth in the *Wileman/Kash I* proceeding.

However, as stated by Respondent:

> "It is elementary that each rulemaking must be judged on the basis of its own administrative record. *In re: Sequoia Orange Co., Inc.*, et al., 47 Agric. Dec. 2 (1988); *In re: Sequoia Orange Co., Inc.*, 41 Agric. Dec. 1511 (1982).

Color Chips and Volume Control

Thus, it is appropriate to examine what impact the 1988 Regulations have on these Petitioners. With respect to the 1988 regulations as regards maturity regulations and 1988 size regulations, to which the Petitioners are subject, it must be asked whether same were promulgated in accordance with law and thus authority exists therefor, and whether Petitioners have proven that the requirements are incorrectly applied to them. Initially, with respect to this contention, the Respondent's position is noted as to Peaches. Unlike the Plum and Nectarine Committees, the Peach Committee did not propose to increase the minimum size requirements for listed Peach varieties in 1988. The Peach Committee did recommend "remov[ing] two varieties no longer produced in significant quantities from variety specific size requirements." (54 Fed. Reg. 12692).

Section 2 of the Agricultural Marketing Agreement Act (7 U.S.C. 602) states in part, that there is a policy to establish and maintain "such minimum standards of quality and maturity and such granting and inspection requirements * * *" as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. (7 U.S.C. 602(3)), Section 8c(6)(A) of the Agricultural Marketing Agreement Act (7 U.S.C. 608(c)(6)(A) specifically provides that Marketing Orders may contain terms and provisions specifying the grade, quality or size of fruit that may be marketed or transported by handlers.

Both Order 916 and Order 917 contain such provisions. The Nectarine Order (7 C.F.R. 916.52(a)(1)) states:

> The Secretary shall regulate, in the manner specified in this section, the handling of nectarines whenever he finds, from the recommendations and information submitted by the committee, or from other available information, that

such regulations will tend to effectuate the declared policy of the act. Such regulations may:

> (1) Limit, during any period or periods, the shipment of any particular grade, size, quality, maturity, or pack, or any combination thereof, of any variety or varieties of nectarines grown in the production area . . . .

The provisions of 7 C.F.R. 917.41(a)(1) are virtually identical with regard to Plums and Peaches. These Orders are not some new innovation. The Plum and Peach Order dates back almost to the enactment of the Agricultural Marketing Agreement Act (previously as 7 C.F.R. 936) and the Nectarine Order has been in existence for 30 years (previously as 7 C.F.R. 937). The above-quoted and cited provisions of 7 C.F.R. 916.52(a)(1) and 7 C.F.R. 917.41(a)(1) were promulgated on June 25, 1958 (23 Fed. Reg. 4616) and December 23, 1965 (30 Fed. Reg. 15990) respectively. The Petitioners do not contend that the Agricultural Marketing Agreement Act and Orders 916 and 917 do not provide *authority* for regulations limiting the handling of Nectarines, Plums and Peaches to those of a certain maturity and size level, but they contend such authority has not been properly implemented and exercised.

Prior to 1980, all Nectarines and Plums were required to meet a U.S. No. I grade and maturity level. The U.S. No. 1 maturity level is that the fruit is mature enough that it will continue to ripen after severing it from the tree. Prior to 1980, the Inspection Service would only require that the Nectarines and Plums reach a U.S. No. 1 maturity level and that they not have over a certain percentage of the fruit in the carton inspected, or in the lot inspected, that did not meet the U.S. No. 1 Standard.

The United States Standards for Grades of Nectarines provide (7 C.F.R. § 51.3147, .3150(a)(3), .3153):[4]

§ 51.3147 U.S. No. 1.

> "U.S. No. 1" consists of nectarines of one variety which are mature but not soft or overripe, which are well formed, clean, and free from decay, broken skins which are not healed, worms, worm holes, and free from injury caused by split pit and free from damage caused by bruises, growth cracks, hail, sunburn, sprayburn, scab, bacterial spot, scale, scars, russeting, other disease, insects, or mechanical or other means.
>
> (a) At least 75 percent of the nectarines in any lot shall show some blushed or red color, except that there are no color requirements for nectarines of the John Rivers variety in this grade. (See § 51.3150.)
>
> . . . .

§ 51.3150 Tolerances.

> In order to allow for variations incident to proper grading and handling in each of the foregoing grades, the following tolerances, by count, are provided as specified:
>
> (a) U.S. Fancy, U.S. Extra No. 1, and U.S. No. I grades —
>
> . . . .
>
> (3) For color — . . . .
>
> (ii) U.S. Extra No. 1 grade and U.S. No. 1 grade. Individual containers may contain not more than 10 percentage points less than the required percentage of nectarines showing the amount of color specified for the

[4] The United States Standards have, at times, been designated by the same numbers, except preceded by "28, i.e., 7 C.F.R. § 51.3147 was previously designated as 7 C.F.R. 2851.3147.

respective grade: *Provided, That* the entire lot averages not less than the required percentage of nectarines showing the specified color for the grade.

. . . .

§ 51.3153 Mature.

"Mature" means that the nectarine has reached the stage of growth which will insure a proper completion of the ripening process.

The United States Standards for Grades of Fresh Plums and Prunes provide (7 C.F.R. § 51.1521, .1530):

§ 51.1521 U.S. No. 1.

"U.S. No. 1" consists of plums or prunes of one variety which are well formed, clean, mature but not overripe or soft or shriveled; which are free from decay and sunscald, and free from damage caused by broken skins, heat injury, growth cracks, sunburn, split pits, hail marks, drought spots, gum spots, russeting, scars, other disease, insects or mechanical or other means.

. . . .

§ 51.1530 Mature.

"Mature" means that the fruit has reached the stage of maturity which will insure a proper completion of the ripening process.

Wileman/Kash directly compete in marketing Nectarines, Plums and Peaches with the entire tree fruit industry, which includes the Chairmen and Committee members of the Nectarine, Plum and Peach Committees. Most, if not all, market their Nectarines, Plums and Peaches in California, as well as throughout the United States, and often compete for Wileman/Kash's buyers, brokers and growers. Because Peaches were not involved in *Wileman/Kash 1*, it is

appropriate to review some of the evidence which is applicable thereto.

Prior to May, 1980, Nectarine Regulation No. 11, Plum Regulation No. 15, and Peach Regulation No. 11, required Nectarines, Plums and Peaches to meet the requirements of U.S. No. 1 grade, herein before set forth. Said regulations stated that when used therein [U.S. No. 1] shall have the same meaning as set forth in United States Standards for Nectarines, Plums and Peaches. U.S. No. 1 Standard means that point where the fruit has reached that stage in the maturity process that it will continue to ripen after being picked from the tree.

In 1980, proposed rules were issued for Nectarines, Plums and Peaches, which still required Nectarines, Plums and Peaches to meet the requirement of U.S. No. 1 grade, and went on to add (and it remained the same through 1987): "Provided, that maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service." Said provisions went on to state that U.S. No. 1 means the same as defined in the United States Standards for Grades of Nectarines, Plums and Peaches.

The Nectarine, Plum and Peach Committees, desiring a "higher" maturity standard, requested the Federal-State Inspection Service (SPI) (meaning, Shipping Point Inspection) to raise the maturity level. The Committees were advised by Shipping Point Inspection that they could not change the U.S. Standards because they applied to all States. The Committees were further advised that if they desire a "higher" maturity level for the fruit, they should get the Marketing Orders amended to require a "well-matured" standard. (Tr. 1155-1156 of prior hearing).

The Nectarine, Plum and Peach Committees, without any delegation or expressed authority from the Secretary of

Agriculture took it upon themselves to create a "higher" maturity level. Pursuant to the directions of the Commodity Committees, the California Tree Fruit Agreement (as employees of the Committees) issued new "regulations." In what was referred to as Nectarine Bulletin No. 1, the California Tree Fruit Agreement supplied to all growers and handlers of Nectarines, a bulletin which "sets forth everything you need to know about nectarine regulations for the 1980 marketing season." The Bulletin stated that all varieties of Nectarines will be U.S. No. 1 with the following exception: "*Maturity* — Nectarines shall be "well-matured" which means that they meet the color standard established for each variety. This maturity requirement is more advanced that the maturity requirement of the U.S. No. 1 grade."

The Bulletin went on to indicate the authority for the new "maturity" standards, and on page 3 stated:

> "You attention is directed to the new and advanced maturity requirement set forth on page 1 of this bulletin. This new maturity regulation was adopted by the *Nectarine Administrative Committee*. The new maturity level is based on color standards that have been developed and established by the Inspection Service and an industry maturity subcommittee. The color standards will be applied on a varietal basis and the maturity subcommittee will be available to deal with any maturity problems that arise."

Immediately following the release of Nectarine Bulletin No. 1, the California Tree Fruit Agreement, issued the Plum and Peach Bulletins which were substantially similar to that issued for Nectarines, except with regard to Plums the fruit was to not only to be "well-matured" but was also to meet "spring" requirements applicable to each variety. It should be noted that these "well-matured" regulations were never, through the 1987 season, adopted by the Secretary of

Agriculture, nor did they ever go through the Administrative Procedure Act process, nor were they ever published in the Federal Register.

Subsequent to the institution of the "well-matured" standard, the Committees established "Maturity SubCommittees." They were to be comprised of members of the Committee. The purpose of the "Sub-committee" was to determine if a variance from a particular color standard should, or should not be, granted to a particular handler during each harvest season.

Commencing with the 1980 tree fruit season, the California Tree Fruit Agreement (employees of the Committees) would recommend to the Committees the particular color standards to be initially applied to each variety of Nectarine, Peach and Plum for the upcoming harvest season. Supposedly, the Committees would make the final determination. The Federal-State Inspection Service did not, and was not allowed, to determine what the color standard would be for any particular variety. The regarded themselves as "neutrals." (Tr. 1642-1644 of *Wileman I* hearing). The Committees, or their appointed Sub-committees (made up of members of the Committees), were the only persons allowed to establish, change, or allow a variance from, the color standard. At no time did the Committees or the California Tree Fruit Agreement personnel permit the Shipping Point Inspection to ignore a particular color standard or override a particular color standard even when the inspectors felt that the fruit was otherwise "well-matured". Even when the Shipping Point Inspection and the California Tree Fruit Agreement employee believed that the fruit was "well-matured" if it did not meet the particular color standard for that variety, it could not be shipped, unless the maturity Sub-committee voted to grant a variance or to change the particular color standard. If the particular Committee or Sub-committee refused to grant a variance, the Shipping

Point Inspection would not allow the fruit to be shipped. (Tr. 1687-1692).

When the color chips, representing the Committees' color standards for maturity, were first developed and used in 1980 as the "law," the Shipping Point Inspection felt that the designated color standard for a particular variety represented a "well-matured" piece of fruit. However, of the 79 varieties of Nectarines listed having color standards, 45 have increased in maturity requirements. Eventually 13 different color chips ranging from "A thru M" were established, ranging from "A" (green) to "M" (bright yellow). The higher the letter designation, the longer that piece of fruit would remain on the tree prior to being picked. For example, if a particular variety of Nectarine had a "G" designation for 1980 and the committee decided to raise that color chip designation to "L" in 1981, the 1981 fruit would be substantially more mature when picked than the 1980 fruit.

From 1980 to 1987, there was no uniformity between the varieties, as to the degree of advanced maturity required for each variety, through the use of the color standards. A piece of fruit can be "well-matured" and overripe and still not meet the color standard as determined by employees of the California Tree Fruit Agreement and members of the Commodity committees.

The specific color standards as imposed by the Commodity Committees did not objectively determine whether the fruit was of good consumer quality and good marketable quality. Further, the color standards and maturity requirements as imposed by the Commodity Committees discriminated against the yellow varieties of Nectarines (such as the Tom Grand, grown by Wileman Bros. and Elliott, Inc.) from those of the newer varieties, that are almost red, as the latter varieties reach and exceed the specific color standard prior to ever becoming "well-matured."

The Management Services Committee and the Executive Committee for the Tree Fruit Reserve established and maintained the well-matured standard for eight (8) years without Secretarial approval.

In the prior hearing, Wileman/Kash questioned the necessity for maturity to be determined at the time of picking, rather than at the time of packing the fruit. The Secretary of Agriculture never published a regulation to that effect; however, maturity determined at the time of picking became a California Tree Fruit Agreement regulation. Respondent argued, and the Judicial Officer adopted, that although the Secretary never required maturity to be determined at the time of picking, California state law required such and the California Tree Fruit Agreement merely incorporated the state law into the California Tree Fruit Agreement Bulletins.

Neither Respondent nor the Judicial Officer referenced any specific statute for the position that maturity determined at the time of picking was California state law.

The Commodity Committee members engaged in favoritism with respect to dealing with handlers and growers, in the arbitrary application of "supervisory discretion" to preclude and/or deny requests for changes or variances from the illegally imposed color standards. A common complaint of handlers, subject to "laws" set forth by the Commodity Committee members, and/or the California Tree Fruit Agreement was that they could not secure relief, by way of a color standard variance, unless LeRoy Giannini (Chairman, at that time, of the Nectarine Administrative Committee) had the same variety, and even then the relief, by way of variance, was never granted unless "LeRoy gets it."

On various occasions, the Commodity Committee members would order the Shipping Point Inspection to allow fruit to pass inspection, for themselves and "friends," that did not

meet color standards. This would be done without calling on the Sub-committee to vote on a variance, and without following their own by-laws.

As statutorily required by law, during the period 1980-1987 the Commodity Committees could operate only with the approval of the Secretary of Agriculture. However, there was no active supervision nor meaningful oversight by the United States Department of Agriculture over their decisions, nor in their application of the precise color standards and maturity standards to be employed, per variety, to the tree fruit. The color standards and maturity standards imposed by the Commodity Committees, through the California Tree Fruit Agreement, for Nectarines, Plums, and Peaches, up through 1987, have never been published in the Federal Register, nor has there been a substantial basis and purposes statement made by the United States Department of Agriculture, nor anyone properly delegated by it, nor were provisions ever made for notice and comment.

The tree fruit Commodity Committees negated the authority delegated by the Secretary of Agriculture to the Federal and the Federal-State Inspection Service as provided in the Orders' provisions. Regulations specifically empowered the Shipping Point Inspection to determine the appropriate maturity standard for each particular variety of Nectarine, Plum and Peach, for each particular season. Instead, the Commodity Committees usurped that authority by setting the standards themselves. The Commodity Committees and their employees, the California Tree Fruit Agreement, relegated the Shipping Point Inspection's authority to that of a neutral bystander which, on occasion might concur in making recommendations to the Committees regarding the appropriate color standards which would be accepted or rejected by the Commodity Committees.

The record evidence herein shows that Wileman/Kash suffered losses as a result of withholding variances and the

arbitrary application of advanced maturity requirements and specific color standards, which advanced standards did not create a better consumer quality Nectarine, Plum or Peach.

In 1988 the Secretary engaged in "rulemaking" for Peaches, Plums, and Nectarines (Ex. Nos. 33, 34, and 35) the results of which remain arbitrary, capricious, and not based upon substantial record evidence, but reinforced an entrenched system.

The mere publication in 1988 of a "well-matured" maturity standard lacks reasoned decisionmaking and is not based upon a substantial record and is contrary to the facts brought forth to the Secretary.

Pursuant to informal rulemaking, 7 C.F.R. § 916.356 and 7 C.F.R. §§ 917.459 and 917.460, the Secretary issued regulations in 1988. (Petitioners Ex. AB 33, 34, 35). The question presented is whether such regulations cured the prior deficiencies of noncompliance with the Administrative Procedure Act. I believe not. It is quite clear that the "well-matured" standard which previously existed was sought to be enacted for the tree fruit industry in 1988, and subsequent years.

The reasons for this statement are obvious. The "well-matured" standard imposed by the United States Department of Agriculture on the tree fruit industry for the 1988 and 1989 harvest *seasons used the same color chips that were in existence in the 1987 harvest season.* [Note: It is not known if the Secretary had a set of color chips before him when he issued the regulations, and, if so, which set. There were two sets which differed. Neither is a part of the rulemaking record.] Since the application of the color chips used in 1987 and prior years was clearly arbitrary and capricious as not reflecting the intended result of determination of maturity, the color chips and other "maturity tests" used in 1988 and 1989 must also be deemed arbitrary and

capricious. There remains a significant difference, depending on the variety, between a U.S. No. 1 Standard and a "well-matured" standard as perceived by the California Tree Fruit Agreement.

The illusiveness of the terms mature and well mature is recognized in the Secretary's 1988 Interim Final Rules where it was indicated that the Secretary, relying on 1979 data as to criticism relating to maturity stated, *inter alia*:

> "We do, however, believe that a more specific definition of 'well-matured' could be helpful. Therefore, comments are invited on developing a definition *with more specificity*." (Emphasis added).

The evidence herein clearly shows that the color chips used were not necessarily reflective of when a fruit had desirable market maturity. The Department recognizes this:

> "Chemists Robert J. Horvat, James A. Robertson and Glen W. Chapman Jr., of USDA's Agricultural Research Service have identified and quantified the exact profile of chemical compounds that make a tree-ripened peach smell mouthwatering good.
>
> 'We identified five specific compounds from tree-ripened fruit that, mixed together in the right quantities, are essential to create what our smell panelists call 'the peach aroma," Horvat said.
>
> He and the co-researchers did the studies at the ARS Horticultural Crops Quality Research Laboratory in Athens, Ga.
>
> He said the research team's informal smell panels could detect differences in the aroma of peaches just four hours after they were picked. On the panels were people who are specialists in odor chemistry.

> 'For our panels to get the best peach smell, we found a peach really had to be less than four hours off the tree,' Horvat said
>
> *But commercially, most peaches must be picked a little on the green side. That allows time for them to be shipped to market before they set soft or overly ripe. Eventually, Horvat said, the objective is to make recommendations for when peaches should be picked for the best compromise in shelf life and aroma.*
>
> *When the researchers analyzed peaches picked on a typical commercial schedule, they found there was a totally different profile for the five essential compounds.*
>
> *'It wasn't so much that any were missing, but rather they were in a different combination of concentrations.'* Horvat said. 'In particular, there was a much lower concentration of the two aldehydes.'
>
> • • • • •
>
> *Now that research has isolated the essential compounds in peaches that come up to snuff as far as aroma, Horvat said studies are needed to pin down the point at which peaches on the tree start approaching that profile.*" [From selected speeches and news releases, January 4-11, 1989.[5] (Emphasis added).
>
> • • • • •

While the administrative agencies and officers have the primary task of administering broad policy mandates for the common good of our society, they should not be required to refine their rules to assure tailor-made equity for each of the

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[5]Neither party requested official notice of this news release and, accordingly, it is mentioned, not for the truth of the statements therein, but, rather to show, together with the vast amount of evidence in this case, the illusiveness of color chips as a determining factor of well matured fruit.

complexities that may arise. However, the rules they issue must be rational and supportable in their general application and must show that they address the important aspects of what they are about to do, and if they are arbitrary, capricious or irrational, they are null and void. *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *Saint James Hospital v. Heckler*, 679 F. Supp. 757 (D.C. Ill. 1984), *aff'd.* 760 F.2d 1460.

The specific color standards adopted for Nectarines and Plums for the 1988-1989 harvest seasons did not objectively determine good consumer quality or marketability. There is nothing in the rulemaking record that suggests that the color standards would result in compliance with whatever goals the Secretary wished to achieve. There is no indication that the Secretary ever considered the impact on the consumer, the impact on the handler, whether the "well-matured" standard would significantly affect East Coast shippers more than West Coast shippers, nor whether the "well-matured" standard was, in reality, intended for volume control rather than quality control.

The Secretary never considered whether the rule could be applied uniformly in order to provide the same amount of shelf life for each variety of fruit, regardless of where it was shipped or whether the fruit was being supplied to a chain store operation or was destined for a terminal market. The Secretary failed to consider whether or not, as a result of the regulations, there would be increased picking costs or decreased parity prices to growers. Based on the rulemaking record before the Secretary, it can only be inferred that he "rubber-stamped" a Committee recommendation, did not give it any independent thought, set no standards and did nothing to define what he actually intended. At the time of formulation of the 1988 regulation, the Secretary had before him the sworn testimony of the *Wileman/Kash I* hearing. The difference in the quality of submission in the aforesaid

rulemaking procedure and in adjudicatory proceeding is substantial: the former consists of comments and recommendations, not subject to cross-examination and not subject to sworn statements.

Nowhere in the proposed rule, the Interim Final Rule, nor the Final Rule is there any indication as to how the Secretary arrived at the particular color chip designations set forth in the Tables, as published in the Federal Register (see Exhibit Nos. 31(A) through 31(G) and 32(Z) through 32(BB).

Basically, Respondent argues that it does not have to show substantial basis in the rulemaking record, because Petitioners have the burden of showing otherwise. More, specifically, Respondent sets forth on brief.

> Since they [the Petitioners] cannot explain away the scientific studies, statements drawn from the experience of experts in the industry, and input from the marketers and consumers, petitioners merely bury their heads in the sand and squawk that there is *no* such information. This ostrich approach, however, does not work, either logically or legally. It is petitioners, not respondent, who bear the burden of showing that there is not substantial evidence and that the rulemaking decision is arbitrary and capricious. Clearly they have not met this burden.
>
> * * * * *
>
> * * * Similarly, petitioners in their Brief make no showing that the rulemaking record of the Department was insufficient in any manner. They merely persist in just stating that it obviously was not sufficient, since it didn't result in a rulemaking decision in accord with their views.
>
> Petitioners further state that the rulemaking proposal documents could have been more descriptive of the proposals. Yet, they fail to show that said documents were not sufficiently detailed to advise them and other inter-

ested growers and handlers. Petitioners would have one believe that each test designation merited a lengthy theoretical discussion. Yet, it is clear from the rulemaking documents and record that the particular test designation for each variety *merely reflected the accumulated in-the-field experience* of the inspection service and the committees staff and members in matching well matured fruit with the particular tests and color chips. Furthermore, the correctness of the vast majority of the designations is apparent in that they drew no comment or request for change in the meetings prior to the proposals (Exhibits 31 (K), (M), (O), (R)), in the comments to the proposals (Exhibits 31 (HH), (II), and (QQ)), or in variance requests during the season (Exhibits 307-310). Even petitioners made suggested changes to very few of these specific tests designations (Exhibit 31 (II)). Thus, it is apparent that petitioners' plaints regarding the descriptive language in the 1988 maturity regulation documents are also without merit. (Emphasis added).

Throughout the course of the instant 15(A) proceeding, Wileman/Kash made attempts to determine where, in the rulemaking record, the rational for the imposition of the color chips was located. Respondent continually argued that the basis for the Secretary's imposition of color chips "was located in the rulemaking record," but did not assist Petitioners in locating same nor indicated the bases therefor. A review of the stipulated rulemaking record regarding the 1988 and 1989 maturity regulations (Exhibit Nos. 31 and 32) fails to reveal where, in the rulemaking record, studies and reports supporting the Secretary's decision might be.

The rulemaking record, as supplied by Respondent and stipulated into evidence, for the 1988 maturity regulations incorporates no reports and/or studies which in any way substantiate or shed light on the reasons behind the Secretary's adoption of color chips as "an accurate indicia of

peach, plum or nectarine maturity." A careful review of Respondent's stipulated rulemaking record for the 1988 maturity and size regulations sets forth three (3) studies, however, *none relates to the application and use of color chips.* The only studies and/or reports incorporated into the rulemaking record are located at Exhibit Nos. 32(GG), 32(HH) and 32(II). These studies and/or reports are not related to the implementation or continued application of color chips in accurately evaluating tree fruit maturity. The record evidence herein shows that color chips are not an accurate indicium of maturity.

At the oral hearing in *Wileman/Kash II*, Respondent did not stand exclusively on the promulgation record of the 1988 regulations. In an attempt to justify the rulemaking record for the implementation of color chips, Respondent presented Mr. Gordon Mitchell, a member of the Department of Pomology at the University of California at Davis. Mr. Mitchell, is without question, one of the world's leading experts in the area of fruit science. Since Mr. Mitchell has, over the years, performed a substantial number of studies paid for by the California Tree Fruit Agreement and the tree fruit Commodity Committees, Respondent's calling Mr. Mitchell to testify was, in theory, a "sure thing." Mr. Gordon Mitchell is the only person that the Committees and the California Tree Fruit Agreement have ever hired to conduct studies relating to color chips. (Tr. 4655). However, Mr. Mitchell failed to provide Respondent with the support Respondent sought.

Mr. Mitchell, instead, testified that the use of the California Tree Fruit Agreement's color chips was virtually meaningless. The newer "redder varieties" of Nectarines and Peaches meet and exceed the most stringent application of color chips prior to their ever becoming internally mature. (Tr. 4552). When a fruit becomes too "mature," it is subject to deterioration.

Respondent's own expert substantiated what Wileman/Kash have been contending and which the overwhelming evidence in this case demonstrates — *that the external color of fruit fails to be an adequate indicia in determining whether or not tree fruit is mature.* The red color development of Peaches and Nectarines is, in essence, cosmetic. As Mr. Gordon Mitchell testified, red color development is an over-color that is often influenced by other factors such as temperature and light and is unrelated to the internal maturity of the fruit. (Tr. 4660). Mr. Mitchell testified that the development of red color is part of the maturation process of Plums, however, for Peaches and Nectarines the development of red color is not linked to maturity. It is merely a function of environment — primarily sunlight and temperature. (Tr. 4661).

Two other witnesses confirmed the testimony of Mr. Mitchell. Mr. Edward Brown, a Supervising Inspector with Shipping Point Inspection, the industry "expert" with respect to tree fruit maturity, appeared and testified pursuant to a subpoena issued by Wileman/Kash. Wileman/Kash provided Mr. Brown with fifteen (15) Sun Grand Nectarines and requested that he evaluate this fruit for color chip external maturity and to then cut the fruit to determine and compare the internal maturity to the color chip maturity evaluations he previously made.

In evaluating the external color of these fifteen (15) Sun Grand Nectarines, Mr. Brown testified that virtually all of the Nectarines tested either met or exceeded the "M" color chip (which is the most stringent of the California Tree Fruit Agreement's color requirements). Yet, upon cutting the fruit to test the internal maturity, the Shipping Point Inspection Supervisor determined that internally the fruit was merely "mature" and not "well-matured." (Tr. 1084-1122). In actuality, the color chip designation which the Committees have determined is appropriate for the Sun

Grand Nectarine is a "G" color chip (Exhibit 32(BB)); the "G" color chip requires substantially less external color than the "M" color chip which Mr. Brown indicated the fifteen (15) Nectarines either met or exceeded. (Ex. No. 248).

The persuasive evidence herein shows that the application of color chips to determine the internal maturity of fruit is arbitrary and capricious. Fruit can be "well-matured" and overripe but still not meet the color chip that was designated for that particular variety. (Ex. No. 2, p. 4). Fruit can meet and exceed the color chip requirement designated for that particular variety but may still not be internally "well-matured." The testing procedures conducted by Mr. Brown established, and the subsequent testimony of Respondent's expert witness, Mr. Gordon Mitchell, confirmed that the use of color chips to determine internal maturity is arbitrary and capricious.

The arbitrary and capricious nature of the use of color chips to determine internal maturity of tree fruit is epitomized by the necessity to inquire "which color chips did the Secretary implement?" In 1988, the Secretary, for the first time, published in the Federal Register a list of the color chip designations to be employed for that year's harvest season. (Ex. Nos. 31(B), 31(E), and 31(G)). In 1989, the Secretary repeated this procedure for the 1989 harvest season (Ex. Nos. 32(Z) and 32(AA)). This was done not only without the Secretary having ever viewed, or incorporated into the rulemaking record, the actual color chips, but without reference to which set of color chips the Secretary was adopting. Respondent has stipulated *that no color chips have ever been incorporated into the rulemaking record* (Appendix "A", Respondent's Stipulated Response No. 21a). The color chips being employed for the 1989 harvest season were not in existence and were substantially different from the color chips which were in existence, and not part of the rulemaking record, at the time the Secretary

promulgated the color chip assignments for the 1988 and 1989 harvest seasons. The effect of arbitrariness of relying upon unknown color chips can extend into the future; whereas in the past, there were more than one set of color chips, each different, although one or the other (or both) were binding upon the industry.

To explain, during the 1987 and 1988 harvest seasons, the Shipping Point Inspection used the "1987" set of color chips. (Ex. No. 262). However, having a need to duplicate additional sets of color chips prior to the 1989 harvest season, the Shipping Point Inspection contracted with a San Jose company to provide additional sets of color chips. Although the color chips were developed and delivered to the Shipping Point Inspection, it became immediately apparent that the color chips did not match the color chips used in prior harvest seasons. (Tr. 2200-2224). It was obvious to the naked eye that five (5) of the new color chips were substantially different from those previously employed by the Shipping Point Inspection. After extensive effort and attempts at modification, the new "1989" color chips were issued to the industry. (Ex. No. 247). The Shipping Point Inspection and the California Tree Fruit Agreement felt that they had a "pretty good match" on most of the chips with the exception of one particular chip which the Shipping Point Inspection intended to "monitor closely" during the season. (Tr. 2200-2224).

Neither the Shipping Point Inspection, the California Tree Fruit Agreement or the United States Department of Agriculture ever had the new color chips scientifically tested to determine their compatibility with the chips used prior to 1989. Instead, these new color chips were issued to the industry based on no more than an eyeball comparison of the two (2) differing sets of color chips. (Tr. 2518). The Secretary, upon issuing his regulations for the 1989 harvest season, failed to reference whether the color chip designa-

tions specified for each variety of fruit were to relate to the "1987" color chips or the "1989" color chips. (Exh. Nos. 32(Z) and 32(AA)). Respondent's expert, Mr. Gordon Mitchell, testified that it would be difficult if not impossible to accurately compare two (2) different color chips with the naked eye. He testified that the human eye may not pick up differences in color that would be denoted by the use of electronic color meters used to scientifically compare color differentiation. (Tr. 4588).

In an attempt to determine the extent of any differences existing between the two (2) sets of color chips employed by the industry, Wileman/Kash employed Dr. Julian Whaley, a Ph.D. in plant pathology and microbiology to evaluate whether a substantial color differential did in fact exist between the "1987" (Exhibit No. 262) and "1989" (Exhibit No. 247) color chips and the extent of that differential. Dr. Whaley used the "Minolta Chronometer" to analyze each "1987" color chip and compare and contrast that color chip with the corresponding "1989" color chip. The Minolta Chronometer was used by Dr. Whaley to establish a numerical value for each color chip designation for the "1987" chips and for each "1989" color chip.

The result of his testing procedures clearly indicates that each and every "1987" color chip when compared with its "1989" counterpart failed to establish a match. Specifically, each color chip, "A" though "M" for 1987 was markedly different than the 1989 chip used by the California Tree Fruit Agreement to denote the "well-matured" maturity standard. (Ex. No. 246).

A review of Exhibit No. 246 not only establishes that the "1987" chips are different from those issued by the Shipping Point Inspection in 1989. but further establishes that there is no pattern or uniformity in either the "1987" or "1989" color chips. For example, it would be expected that as one moved from the "A" color chip through to the "M" color

chip a gradual increase in yellow color from the "A" to the "M" color chip would result. However, such is not the case. (Tr. 2055).

In fact, the "I" color chip has less yellow color than the "H" color chip. The same is true for the "K" color chip and the "L" color chip. Meaning, if a grower sought relief by way of a variance from the "L" color chip requirements, by being granted relief from the "L" color chip to the next lower color chip (that being the "K" color chip) he would, in fact, be required to meet a higher maturity determination, as the "K" color chip has a higher degree of yellow than the "L" color chip within the same set of chips. This same result occurs when testing either the "1987" or "1989" color chips. (Tr. 2054; Ex. No. 246).

The testimony of Dr. Whaley was later confirmed by Respondent's own expert, Mr. Gordon Mitchell. Mr. Mitchell testified that if he were requested to compare two (2) color chips with one another, he would necessarily use one of the electronic color meter machines rather than attempt to "eyeball" the chips to evaluate their differences. He stated he would use either the Hunter, the Gardener or the Minolta units for these determinations, as they would provide accurate numerical evidence of the differences between the color chips. (Tr. 4599-4602). Although Mr. Mitchell testified that he would use the "A" scale, the "B" scale and the "L" scale to measure the exact color differential as opposed to Dr. Whaley's only using the "B" scale, he did confirm, however, that if differences exist on the "B" spectrum, the chips would be different colors. (Tr. 4632).

Mr. Mitchell went on to confirm that he certainly would not impose upon the tree fruit industry a new set of color chips, such as those issued in 1989, without having properly compared them with the previously issued "1987" chips. Had he been requested by the California Tree Fruit Agreement to study the "1987" color chips to determine their compatibility with the newly issued "1989" color chips, he would have tested them before issuing new color chips. (Tr. 4636). This was not done by the Shipping Point Inspection, the California Tree Fruit Agreement or the United States Department of Agriculture before issuing regulations which are used to govern the tree fruit industry.

Further, the rulemaking record does not reflect that the Secretary was aware that the new chips were issued in 1989, Instead, the "1989" color chips were issued and made the "law" without any testing and/or studies being conducted and without the Secretary of Agriculture ever having approved the issuance of these new color chips. Clearly, forcing the entire tree fruit industry to comply with this haphazard approach can only be deemed arbitrary and capricious.

One who is subject to such stringent regulations, as is the California tree fruit industry, has a right to know — On what did the Secretary base his determination that the Tom Grand Nectarine must meet an "L" color chip before it can be deemed "well-matured?" On what information did the Secretary determine that the Black Beaut Plum must have "full surface distinct red dolor with 'spring,' or supervisor discretion" for it to satisfy the definition of "well-matured?" On what criteria is "spring" evaluated? What is the definition of "Supervisor Discretion," and what are the parameters of said discretion? On what information did the Secretary determine that the Elegant Lady Peach must meet an "M" color chip before it could be determined to be "well-matured?"

These questions can be asked regarding each and every variety of Nectarine, Plum and Peach listed in the Secretary's final rule. Did the Secretary ever question what is "spring," what is "slight spring," what is "good spring," when evaluating the spring requirement in his establishment of the "well-matured" designation for each variety of Plum?

Respondent's own expert, Gordon Mitchell, testified that he has submitted reports to the California Tree Fruit Agreement explaining that the use of "spring" is poor indicia in determining the internal maturity of Plums. (Tr. 4575). Mr. Mitchell stated that he has told the Plum Committee that "spring" was not a good measure of maturity. In fact, he has no explanation as to why "spring" is still being employed by the industry. (Tr. 4658-4659).

It has previously been proven and the record herein amply shows that the specific color standards and maturity requirements as determined by the use of color chips discriminates against fruit which has less red color and favors fruit, particularly the newer varieties, because the newer red varieties reach and exceed the specific color standards prior to ever becoming "well-matured."

It is not the purpose of this administrative proceeding to delineate the manner in which the Department engages in rulemaking, but, rather to determine if prior rulemaking fulfills legal requirements. *See, North Buckhead Civic Association v. Skinner*, (11th Cir. June 26, 1990) 3 AdL.3d 98, as to the arbitrary and capricious standard and, the relevancy, of inquiry if the Secretary's decisions were based on a consideration of the relevant factors and whether there has been a clear error of judgment. The Eleventh Circuit in *North Buckhead* noted that the difference between the arbitrary and capricious standard and the reasonableness standard was not of great pragmatic consequence. A pertinent question is, did the Secretary ignore or fail to respond to pertinent factors.

Title 5 U.S.C. § 553 is designed to give affected parties an opportunity to participate in agency decisionmaking early in the process, when the agency is more likely to consider alternative ideas.

"Section 553 is intended to insure that the process of legislative rulemaking in administrative agencies is in-

fused with openness, explanation and participatory democracy which is essential to minimize the dangers of arbitrary and irrational decisionmaking. While the final choice of among technically available alternatives is vested with the administrative agency, it is only when decisions are made in an atmosphere of public understanding, awareness and participation that resulting rules and regulations reflect a spirit which is consistent with our form of government and thus entitled to the respect of the Courts." *State of Carolina v. Block*, 558 F. Supp. 1004 D.S.C. 1983), rev'd on other grounds after rem., *cert. denied*, 464 U.S. 1080 (1984).

The Department of Agriculture, when setting forth its own "Departmental Regulations," adopted the provisions of the Administrative Procedure Act in stating:

"The Department is committed to providing the public reasonable opportunity to participate in rulemaking. For rules that have a substantial effect, it is recommended that comment periods on proposed regulations be 30-days or more." *U.S.C.A. Regulatory Decisionmaking Requirement*, 1512-1 p. 9, December 15, 1983.

As with assessments, the Secretary failed to comply with the requirements of the Administrative Procedure Act and his own "Departmental Regulations." The proposed rules which, for the first time, attempted to set forth a "well-matured" maturity standard failed to allow for the 30-day notice and comment period.

Department Regulation 1512 was not a discourse on internal agency procedures, but rather affected the rights or interests of those regulated. As explained in *Montilla v. Immigration and Naturalization Service*, 3AdL.3d 856 (2nd Cir. February 12, 1991):

"The seeds of the *Accardi* doctrine are found in the long-settled principle that the rules promulgated by a

federal agency, which regulate the rights and interests of others, are controlling upon the agency. *Columbia Broadcasting System, Inc. v. United States*, 316 US 407, 422 (1942) (agency regulations on which individuals are entitled to rely bind agency). The doctrine was first announced in an immigration case in *United States ex rel. Accardi v. Shaughnessy*, 347 US 260 (1954), where the Court vacated a deportation order of the Board of Immigration Appeals because the procedure leading to the order did not conform to the relevant regulations. The failure of the Board and of the Department of Justice to follow their own established procedures was held to be reversible error.

The doctrine has been applied in other contexts, for example, in *Service v. Dulles*, 354 US 363 (1957) and *Vitarelli v. Seaton*, 359 US 535 (1959), to vacate the discharges of government employees, and in *Yellin v. United States*, 374 US 109 (1963), to overturn a criminal contempt conviction. This Circuit and other circuits have also used it. *See, e.g., Smith v. Resor*, 406 F2d 141, 145 (2d Cir 1969); *United States v. Leahey*, 434 F2d 7, 9-11 (1st Cir 1970); *United States v. Heffner*, 420 F2d 809, 812 (4th Cir 1969); *Geiger v. Brown*, 419 F2d 714, 718 (DC Cir 1969); *Pacific Molasses Co. v. FTC*, 356 F2d 386, 389-90 (5th Cir 1966).

The *Accardi* doctrine is premised on fundamental notions of fair play underlying the concept of due process. *See International House v. NLRB*, 676 F2d 906, 912 (2d Cir 1982); *Massachusetts Fair Share v. Law Enforcement Assistance Administration*, 758 F2d 708, 711 (DC Cir 1985); *K. Llewellyn, The Bramble Bush* 43 (1951); *Note, Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629, 630 (1974). *Its ambit is not limited to rules attaining the status of formal regulations.* As the

Supreme Court noted '[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required,' and even though the procedural requirement has not yet been published in the federal register. *Morton v. Ruiz*, 415 US 199, 235 (1974) (declining to address constitutional issues raised by aggrieved Indians because case disposed of on this statutory ground). (Emphasis added).

To be sure, the cases are not uniform in requiring that every time an agency ignores its own regulation its acts must subsequently be set aside. Nonetheless, decisions contrary to the views expressed in *Accardi* may generally be distinguished from the instant case because in most of those cases the agency regulation that was departed from governed internal agency procedures rather than, as here, the rights or interests of the objecting party; *see, e.g., United States v. Caceres*, 440 US 741, 752-55 (1979); *American Farm Lines v. Black Ball Freight Service*, 397 US 532, 538-39 (1970); *United States v. Lockyer*, 448 F2d 417, 420-21 • • •.

The Secretary issued, on April 8, 1988, his proposed rule with respect to the imposition of the "well-matured" maturity standard for Plums. (Ex. No. 31(C)). In that proposed rule he provided for a 15-day comment period. He subsequently extended the comment period an additional seven (7) days. (Ex. No. 31(D)). With respect to Peaches and Nectarines, the Secretary issued his proposed rule regarding the imposition of the "well-matured" maturity standard on April 18, 1988. (Ex. Nos. 31(A) and 31(F)). Again, he allowed only a 15-day notice and comment period.

Justification for violating the provisions of the Administrative Procedure Act cannot be forthcoming from the Department's publication:

> "... the Department already has received letters in opposition to the proposed nectarine size changes indicating the industry is aware of the committee's recommendation." (53 F.R. 12690; Exhibit No. 31(A)).

That statement presumes that because comments previously had been received, that the entire tree fruit industry must be aware of the proposed regulatory changes, and that all individuals who desired to comment had done so. *However, nowhere in 5 U.S.C. § 553 does it indicate that a reasonable notice and comment period may be minimized or ignored because some interested parties became aware of the proposed regulation and submitted comments.* It cannot be presumed, merely because one or two individuals received advance notice of the proposed rule and submitted comments, that the entire industry was aware of the proposed rulemaking and were capable of providing their comments within a 15-day period.

Informal meetings are not a substitute for the hearing requirement and make a mockery of due process. *C&K Manufacturing & Sales Co. v. Yeutter*, (D.C. Cir. August 28, 1990) 2 AdL.3d 572.

Furthermore, the Secretary failed to provide any substantial basis and purpose upon which comments could be directed, making the 15-day notice and comment period meaningless. There were no substantial basis and purpose provided for the color chip designations or "spring" requirements set forth in the proposed regulations for Nectarines, Plums or Peaches. There is no explanation as to how the particular color chip designations were determined, why each color designation was appropriate, and who deemed

those particular color chip determinations to be a true measure of maturity.

The color chip requirements are substantive rules no less than volume limitation regulations, and they establish a binding norm that is subject to the notice and comment and 30-day effective date of the Administrative Procedure Act, unless the "good cause" exception is applicable. (5 U.S.C. § 553(b)(B), (d)(3)).

In the subject case there has been no proof that an emergency existed. The procedure entail herein has existed over many years. There has been no attempt made to experiment with another system such as was done with the Navel Orange Administrative Committee during a two-year period (1983-1985). The facts in *Wileman/Kash II* do not show that it was impossible or impracticable for the Secretary to execute his statutory duties in order to achieve the objectives of the Act, had he not invoked the good cause exception.

Civil penalty rules subject to the Administrative Procedure Act notice and comment rulemaking requirements were considered in *Air Transport Association of America v. Dept. of Transportation* (D.C. Cir. April 13, 1990) 3 AdL.3d 160. The Court found therein that there was not "good cause" to dispense with the statutory requirement of the Administrative Procedure Act and it was noted that the good cause exception is to be narrowly construed and only reluctantly countenanced. Statutory time limits do not ordinarily excuse compliance with the Administrative Procedure Act's procedural requirements.

If the Secretary were required to give notice and comment opportunity as to the regulations, including approval of the expense budgets of the various Committees, the Administrative Conference of the United States has suggested 30 days as a minimum comment period, with 60 days as a more

reasonable minimum period as stated in *Petry v. Block* 737 F.2d 1193, 1201 (D.C. Cir. 1984): The Administrative Conference of the United States has opined, for the guidance of administrative agencies, that the shortest period in which parties can meaningfully review a proposed rule and file informed responses is thirty days. [Administrative Conference of the United States, Guide to Federal Agency Rulemaking 124 (1983)]. However, there is scarcely anything talismanic about that particular length of time. Indeed, a thirty-day period is, in the Administrative Conference's view, 'an inadequate time to allow people to respond to proposals that are complex or based on scientific or technical data.' [Footnote omitted]. The Administrative Conference itself thus suggest a sixty-day period as 'a more reasonable *minimum* time for comment.'" [Footnote omitted].

The Secretary's promulgation of rules which impact the economic well-being of the entire tree fruit industry, may not use administrative expediency or the wishes of a few dominant persons in the industry to shut out input from others. Such methods result in failure to explain the *rationale* for the Secretary's rules, or upon what basis those rules are promulgated. *See, United Mine Workers of America v. Department of Labor* (D.C. Cir. April 2, 1991), where the Appellate Court remanded for more fully reasoned decision-making, stating in part:

> Instead, the Assistant Secretary must make an additional and distinct finding that, considering all of the effects of the proposed alternative method, both positive and negative, modification would achieve a net gain, or at least equivalence, in overall mine safety. *See Emerald II*, slip op. at 6; *Quarto*, slip op. at 5. At a minimum, this second step requires the Assistant Secretary to respond reasonably to serious Union concerns regarding the proposed modification, and to explain why the benefits of

modification would outweigh or neutralize any potential adverse effects. *See Emerald II*, slip op. at 8.

* * * * *

It may well be the case that modification of section 75.326 at the Martinka No. 1 Mine will lead to an overall safety gain, or at least to the retention of existing safety levels. Under *Emerald II*, however, the Assistant Secretary is required to make that determination explicitly and on the record. Because he has failed to do so here, we remand for reconsideration. On remand, the Assistant Secretary must perform the second step of his own test for modification, providing reasoned analysis on the global safety effects of the SOCCO's proposal and considering the detrimental effects cited by UMWA.

After failing to provide a sufficient basis upon which to permit interested persons an opportunity to participate by submission of relevant views, data and argument, he then fails to provide a sufficient notice and comment period to allow for even a superficial response.

Without adequate notice there is a violation of due process. *Mobile Exploration and Prod v. FERC* (5th Cir., 1989) 1 AdL.3d 1397.

Due process requires adequate notice where individual interests may be adversely affected by a proceeding. *Pyro Mining Co. v. Slaton* (6th Cir., 1989) 1 AdL.3d 924. For other cases relating to due process see, *Chernin v. Lyng* (8th Cir., 1989), 1 AdL.3d, 560, wherein it was stated that due process is a separate right from the statutory grant. It is not derived from congressional intent in a statute, but from the Fifth Amendment. In that case, the failure to give the litigant therein a hearing rendered the Department of Agriculture's actions a violation of due process, and the Fifth Amendment.

With respect to the Secretary's imposition of small-sized elimination of Nectarines and Peaches, he failed to satisfy the legal requirements as imposed by the Administrative Procedure Act and failed to follow his own policy.

The Nectarine, Peach and Plum Committees held their annual meetings in December, 1987. At those meetings, the Committees recommended, and forwarded to the Secretary, small-size elimination regulations. In April 1988, *four months* after the Committees submitted their recommendations, the Secretary issued proposed rules indicating his intention to eliminate small-sized Nectarines (53 Fed. Reg. 12687; Exhibit No. 31(A)), Peaches (53 Fed. Reg. 12691; Exhibit 31(F)) and Plums (53 Fed. Reg. 11669; Exhibit No. 31(C)). In each of those proposed rules, the Secretary allowed only a 15-day notice and Comment period. With respect to each of these tree fruit commodities, the Secretary stated "a comment period of less than 30-days is deemed appropriate for this proposal." The Secretary goes on to state that the harvest season is about to commence as to each of these commodities, which seems to imply that it is appropriate to give less than a thirty-day notice.

To compound the Secretary's disregard of the law with regard to allowance of a thirty-day notice and comment period, the Secretary issued his Interim Final Rule, wherein he implemented smaller-sized elimination regulations as to Nectarines and Peaches with no notice whatsoever. On May 27, 1988, the Interim Final Rules were published in the Federal Register. The Secretary, in identical statements for Nectarines and Peaches, stated:

> "Pursuant to 5 U.S.C. 553, it is also found and determined that it is impractical, unnecessary and contrary to the public interest to give notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until thirty days after publication in the Federal Register. . . ." (53 Fed. Reg. 12931 (Nectarines), Exhibit No. 31(B)); 53 Fed. Reg. 19238 (Peaches), Exhibit No. 31(G)).

If the elimination of smaller-sized Nectarines and Peaches would in some manner effect the nation's safety, "emergency" implementation of these regulations would undoubtedly be appropriate. However, it is difficult, if not impossible, to comprehend the need for the Secretary to avoid the requirements of the Administrative Procedure Act and his own "departmental policy." But to state that it is "impracticable, unnecessary, and contrary to the public interest to give notice" is without basis. The "public interest" exception contemplates real harm to the public, not mere inconvenience to the agency. *U.S. Steel Corp. v. E.P.A.*, 649 F.2d 572 (8th Cir. 1981).

Respondent argues that the Secretary property invoked the good cause exception to providing for notice and comment in that the Administrative Procedure Act provides that notice and comment rulemaking is not required: "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (1988). Respondent contends that notice was both impracticable and unnecessary.

Respondent would disregard the 30-day comment period in favor of the rule: "The only comment period required is one which will provide interested persons with a reasonable opportunity to respond. *Phillip Petroleum Co. v. U.S.E.P.A.*, 803 F.2d 545 (10th Cir. 1958)." The Respondent does not want the Department burdened with rulemaking requirements beyond the strictures of the Administrative Procedure Act. It is sufficient, from Respondent's viewpoint, if the recommendations of the Committees were discussed and announced at public meetings.

The "good cause" exceptions to the Administrative Procedure Act are intended to be used only when an emergency or a real necessity exists.

> "The exception of situations of emergency or necessity is not an escape clause in the sense that an agency has the discretion to disregard its terms or facts. A true and supported or supportable finding of necessity or emergency must be made and published." *Senate Report No. 248*, 79th Cong., 2d Sess. 200 (1946).

The Secretary fails to acknowledge that emergency situations are indeed rare and that Courts will examine closely proffered *rationale* justifying the elimination of public procedures. *American Federation of Government Employees v. Block*, 655 F.2d 1153 (D.C. Cir. 1981). The Secretary bears the burden of proof when he determines that notice is unnecessary. *Northern Apahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987).

The Secretary had the Committees' recommendations for over four months before issuing his Proposed Rule (for which he allowed a 15-day notice and comment period). Five weeks later, he issues an Interim Final Rule, in which he determined that notice is not required as, after months have passed, an "emergency" in then found to exist. The Secretary's determination that notice and comment is not required, based on his own interpretation of the requirements of the Administrative Procedure Act, does not discharge his burden of proof. Further, the Secretary's failure to consider the Committee's recommendations for a period of four months, does not then allow him the option to avoid the Administrative Procedure Act by claiming an "emergency." The Secretary cannot create, or be the cause of an emergency based on his own dilatory conduct, as a basis for avoiding the Administrative Procedure Act.

Year after year, the Secretary dispenses with notice and comment requirements by merely claiming that he has "good cause." *In Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982) the Ninth Circuit Court observed:

> "The notice and comment procedures in Section 553 should be waived only when 'delay would do real harm.' The good cause exception is essentially an emergency procedure. This Court would not permit the Environmental Protection Agency to rely solely on statutory deadlines to satisfy the good cause exception in enacting clean air standards. *Western Oil & Gas v. E.P.A.*, 633 F.2d 803, 810-813 (Ninth Cir., 1980). *U.S. Steel v. E.P.A., supra.*"

The good cause exception to notice and comment is an emergency procedure, which must be interpreted narrowly, and used only when the delay attendant to notice and comment rulemaking would do real harm. Buschmann, supra; *United States Steel Corp. v. E.P.A., supra.* "As the legislative history of the APA makes clear, moreover, the exceptions at issue here are *not* 'escape clauses' that may be arbitrarily utilized at the agency's whim." *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). Examples of where the good cause exception has been found to have been property applied were explained in *South Carolina v. Block*, 558 F. Sup. 1004, 1018 n. 18 (D.S.C. 1983):

> Courts have found good cause several times in cases involving government price controls, because the announcement of future controls could cause severe undesirable market distortions. *See De Rieux v. Five Smiths, Inc.*, 499 F.2d 1321 (Em. App.,), *cert. denied*, 419 U.S. 896 (1974); *Nader v. Sawhill*, 514 F.2.d 1064 (Em. App. 1975). The exception has been approved concerning regulations on gas stations where shortages and discriminatory prices had led to privations of supply and violence. *Reeves v. Simon*, 507 F.2d 455 (Em. App. 1974), *cert. denied*,

420 U.S. 991 (1975). It has also been permitted when the exigencies of a foreign relations crisis made an imperative response essential. *Marenji v. Civiletti*, 481 F. Sup. 1132 (D.D.C. 1979; *cf. Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980).

The examples illustrate that the good cause exception requires a true emergency with exigent circumstances. Courts have warned that such emergency situations are rare and that Courts will closely scrutinize the reasons used for dispensing with notice and comment. *American Fed'n of Gov't Employees*, 655 F.2d at 1157 n. 6; *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980).

There was no emergency in this case. Courts have rejected an agency's reliance on the good cause exception where the so-called *emergency was solely the result of the agency's own creation of deadlines, or merely a reflection of a desire for administrative efficiency. Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983); *Sharon Steel Corp. v, E.P.A.*, 597 F.2d 377, 380 (2d Cir. 1979); *South Carolina, supra*, 558 F. Sup. at 1018.

The Secretary's statement in the final rule that there was not sufficient time to allow notice and comment does not suffice. Since deadlines alone cannot equal good cause, the Secretary failed to provide a good cause for dispensing with notice and comment. Mere recitation that there was good cause does not create good cause, nor does a desire to provide immediate guidance. *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d at 803.

The Secretary's 1988 attempt at rulemaking encompassed significant decisions *affecting the tree fruit industry. Prior comment at the Committee meetings cannot substitute for the requirement of notice and comment contained in the Administrative Procedure Act. Not all who wanted to com-*

ment might have been present at the Committee meetings. In addition, notice and comment allows anyone, not merely handlers in the industry, to comment. This would give someone a chance to comment who might not have known about the Committee meetings. Moreover, there are those who attend the Committee meetings who, for one reason or another, do not speak up either because it will be meaningless or they do not want to incur the ill will of the larger handlers. If this kind of prior comment could substitute for the notice and comment required, Congress would have so specified.

As set forth by Judge Edward Dean Price in a review of Judicial Officer Campbell's ruling in *Riverbend Farms, Inc., et al. v. Yuetter, (CV F-88-98 EDP) (1989), wherein, with respect to the Secretary's use of the "good cause" exception to justify the weekly imposition of prorate quotas, he states:*

> "... the practice is constant, and no attempt has been made to limit the practice to those cases where intervening forces of nature make it *imperative* that the regulations be issued without the necessity or possibility of public comment, at p. 9."

The Secretary has failed to establish "good cause" for ignoring the provisions of the Administrative Procedure Act.

The Secretary's failure to allow for any meaningful comment with regard to size elimination and the imposition of the "well-matured" maturity standard as determined by the application of color chips cannot be ratified. It is clear that the Secretary's proposed rules failed to establish a substantial basis and purpose as to the particular color chip designations, per variety, and violated the notice and comment provisions of the Administrative Procedure Act. Therefore, as to those regulations not complying with the Administrative Procedure Act with respect to the imposition of the well-matured maturity standard, and the use of color chips,

as they relate to Nectarines, Plums and Peaches and to the small-sized elimination of Nectarines and Peaches, they must be declared not binding upon Petitioners.

Petitioners also challenge the Constitutionality of the Agricultural Marketing Agreement Act of 1937, contending that the Act contains insufficient standards. Although it is appropriate for Petitioners to raise Constitutional issues in this administrative proceeding (*United States v. Ruzicka*, 329 U.S. 287, 294 (1946)), an administrative agency has no authority to question the constitutionality of a statute under its jurisdiction. *Public Utilities Commission of California v. United States*, 355 U.S. 534, 539 (1958); *In re: George Steinberg and Son, Inc.*, 32 Agric. Dec. 236, 248 (1973), *aff'd*, 491 F.2d 988 (2nd Cir.), *cert. denied*, 419 U.S. 830 (1974).

The appropriation clause of the Constitution of the United States requires that all monies drawn from the treasury be in consequence of appropriations made by law. The payment of monies without an Appropriation Act authorizing it, is illegal.

The Petitioners have raised, among their Constitutional contentions, the difference which exists between appropriated monies and monies derived from statutorily imposed fees which the Courts have had occasion to consider both from the aspect of the retroactivity and their disproportionate application. Although avoiding the Constitutional tax issue in this proceeding, it is nevertheless one which frequents the Courts. Fees which are more like a tax because they provide money for projects that benefit the general public are constitutionally defective. *See, Bacchus Imports Limited v. Dias*, 468 U.S. 263 (1984); *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987).

Although fully mindful of other Constitutional issues raised herein, for the most part, only a brief reference is

made thereto, because of adherence to the principle that when cases can be decided on non-Constitutional issues, they should be. Among such contentions of Petitioners is that of seeking reliance upon the pronouncement over the years of the Supreme Court, the Court of Claims and the Courts of Appeal for the Federal Circuits, which have consistently upheld the principle that excessive regulation may constitute a taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 1986, 104 S.Ct. 2862, 2874-75 (1984); *Kirby Forrest Industries v. United States*. 104 S.Ct. 2187, 2196 (1984); *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980).

The Supreme Court has enunciated the following tests as to whether a regulatory taking occurred: "A statute regulating the uses that can be made of property affects a taking if it 'denies an owner economically viable use of his land . . . .'" *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 2370-71 (1981).

Thus, the Petitioners argue that the Secretary's imposition of size restrictions as to Nectarines and Peaches for the 1988 and 1989 harvest seasons is unconstitutional as being a violation of the Fifth Amendment's Just Compensation Clause.

Respondent argues that since there was not a substantial taking, *Wileman/Kash* had the benefit of the majority of their expectations so that a taking did not occur which is compensable. However, the 1988 regulations are procedurally defective and, although there was a "taking" of *Wileman/Kash's* property, the matter can be determined under the Administrative Procedure Act.

Volume control is *prohibited* by the Agricultural Marketing Agreement Act, with the exception of products listed in

7 U.S.C. 608c(2). Nectarines, Plums and Peaches are *not* subject to volume control.

The Secretary's imposition of regulations eliminating the smaller-sized Nectarines and Peaches is arbitrary, capricious and was illegally imposed for volume control.

The regulations published in 1988, do not meet the requirements of the Administrative Procedure Act and were arbitrary, capricious and not based upon sufficient and substantial evidence in the rule making record.

Although there was an attempt, after the *Wileman/Kash I* hearing to correct the implementation of the Order provisions, the 1988 regulations fall short of achieving the requirements of the Administrative Procedure Act:

(1) There was an insufficient notice and comment period with respect to the Interim Final Rules, and no good cause was shown for not providing additional comment period;

(2) There was no "emergency" existing which would permit the Secretary to only provide a fifteen day notice period instead of at least thirty days;

(3) There was no emergency existing except a self-made emergency by the Secretary, in issuing an Interim Final Rule, as opposed to another proposed rule;

(4) Since the Interim Final Rule, with respect to maturity procedures, was drastically different than the proposed rule issued five weeks earlier, no Interim Final Rule should have been issued before another proposed rule was issued, and the Secretary's reliance on the emergency exceptions to justify the Interim Final Rule is without merit and without validity;

(5) There is no basis and purpose statement with respect to the new size elimination and maturity rules and regulations;

(6) The Interim Final Rules wholly failed to address objecting comments, refused to consider other alternatives, and relied on incorrect and misleading information that the Secretary knew or could have known to be false and/or misleading.

The Petitioners also contend that the delegation of authority by the Secretary to Committees, made up of Petitioners' competitors, and the delegation of authority to the Maturity Subcommittees, and to the Appeals Committees, are contrary to the intent and policy of Congress in enacting the Agricultural Marketing Agreement Act of 1937, and contrary to the spirit and intent of the Agricultural Marketing Agreement Act.

The record as a whole supports Petitioners' contentions that the Secretary failed to comply with the Administrative Procedure Act's notice and comment period, and that there was no good cause shown for not doing so, other than habitual practice. (2) The Secretary's regulatory rules promulgated for the 1988 harvest season, and years subsequent, are arbitrary, capricious, and not based upon substantial evidence. No explanation is given for issuing an Interim Final Rule, which substantially differed from the proposed rule issued by the Secretary approximately five weeks earlier, with respect to maturity determinations and maturity variances. The Secretary's proposed rule with respect to maturity for Peaches, Plums and Nectarines, proposed that the Shipping Point Inspection Service actually set color standards or other maturity tests to determine the "well-matured" standard, and granted only to the Shipping Point Inspection the right and ability to vary or change those color chip standards or other maturity tests, which proposed to eliminate the Maturity Subcommittee of each of the respective Committees, which had existed from 1980 through the 1987 seasons. In said proposed rules, the Secretary published, for the first time, the "color standards" or other

"maturity tests" which the Secretary claimed the Inspection Service established previously, which the evidence in this proceeding refutes in that in the past eight years, it was the Maturity Subcommittees, made up of Petitioners' competitors, utilizing the California Tree Fruit Agreement which actually set the "color standards" or other maturity tests, and changed the "color standards" or other maturity tests, and which granted or denied supervisory discretion as to variances.

With respect to the Interim Final Rules issued regarding Peaches, Plums and Nectarines, there were unwarranted statements made in the Interim Final Rules which the Secretary could have known or should have known, were inconsistent with the facts (some of which were brought out in sworn testimony in *Wileman/Kash I*) or were conclusions drawn by the Secretary which were arbitrary, capricious, or not based upon persuasive evidence — some of which are stated as follows:

(a) Comments to the proposed rule not only discussed, but showed, that the maturity regulations and the size recommendations were done by the Committees for volume control; the Secretary never addressed this comment;

(b) The Secretary, with respect to Nectarines, found that consumers wanted larger-sized Nectarines, but at the same time, found that the evidence was inconclusive with respect to consumers not desiring smaller-sized Plums — despite the fact that the same studies cited by the Secretary with respect to Plums were the same authorities cited with respect to Nectarines, and the studies do not distinguish between the two; and in fact, only four retailers out of twenty-five retailers interviewed wanted to see the smaller sizes eliminated, and twenty-one out of twenty-five of the retailers interviewed wanted both the smaller sizes and the larger sizes;

(c) The report (by Ervin D. Thuerk) cited by the Secretary was directed to twenty-five "key supermarket chain executives" which represented only 38.7 percent share of the total industry, and the Secretary failed to point out that the terminal markets were totally unrepresented in the study conducted, which is where many handlers, including the Petitioners, ship their fruit;

(d) The Secretary cites Mr. Thuerk's research that early-season fruit which is small in size does not provide satisfaction to the consumer and does not encourage repeat purchases, but fails to consider and discuss that only four out of the twenty-five large supermarket chains interviewed wanted to eliminate small sizes, while the vast majority wanted to keep them; thus the Secretary relied on certain statements made by Mr. Thuerk, and failed to address others that would contradict the conclusions wished to be drawn by the Secretary;

(e) The Secretary addressed the comments that it was too late for growers to modify their cultural practices in order to meet the more restrictive size requirements for Nectarines and Peaches, but the Secretary rejected this by stating that when the Committee made its recommendations the growers had already begun to undertake cultural practices to obtain "desirable fruit size"; but with respect to Plums, the Secretary contradicted this statement by stating: "Finally, it is too late this season for growers to make any cultural changes on the basis of the proposed size increases if they have not already done so"; and the Secretary fails to explain the difference in the two statements — one with respect to Nectarines and Peaches, and the other with respect to Plums;

(f) In response to the comments that the size proposal would reduce the volume of fruit and was thus volume control, the Secretary stated that that was disputed because "small size Nectarines have been a detriment to the trade

and as such the industry has directed its efforts toward production and marketing of better quality and larger size fruit", and thus, there was a failure to address the issue of whether there would be a reduction of the amount of fruit to reach the market and was indeed volume control;

(g) Furthermore, the size regulations affect certain varieties of fruit, but were not directed at other varieties of fruit which is discriminatory, arbitrary and capricious, since if consumers reject small-size fruit, they would reject them with respect to all varieties, and not just some varieties; the Secretary made an unfounded statement when he stated that since May 16, 1980, Nectarines, Plums and Peaches "have been required to be 'well-matured' rather than 'mature' ". Equally misleading was the statement that "this requirement has been implemented by the Federal-State Inspection Service since that time"; since in truth and in fact, which was known by the Secretary, the regulations which went into effect on May 16, 1980, did not state that fruit was required to be "well-matured" but it was merely what the Committees decided thereafter to implement on their own without any rulemaking whatsoever; the Secretary knew, or should have known, that the Federal-State Inspection Service did not set those standards in the past, but were set by the Committee of competitors made up of the Plum, Nectarine and Peach Committees and their respective Maturity Subcommittees, along with the California Tree Fruit Agreement; the Secretary also invalidly states that since 1980 "the Federal-State Inspection Service, based on its expertise, has been primarily responsible for determining which specific test or tests should be used for each variety of Nectarines and which test level (e.g., particular color chip) is appropriate for each variety", and the Secretary knew, or should have known, that this statement was incorrect since the Federal-State Inspection Service has merely occupied a neutral, by-stander role with the respect to the Committees and their respective Maturity Subcommittees; under the

cloak of authority, the California Tree Fruit Agreement, actually set the standards, changed the standards at their whim and actually made "law" regardless of the concerns and opinions of the Federal-State Inspection Service;

(h) The Secretary also states that when the proposed rule was issued in April, 1988, the responsibility for issuing the maturity tests, and granting variances during the seasons with respect to those maturity tests, was proposed to be given to the Federal-State Inspection Service to "lessen the burdens on Committee members", and Petitioners contend that the Secretary knew, or should have known, that this statement that the proposal to provide sole responsibility to the Federal-State Inspection Service, was a direct result of the Petitioners' previously filed and heard administrative petition;

(i) The Secretary also invalidly stated that it was proposed to continue the "requirement that not less than ninety-percent of the fruit surface shall meet the color guide established for that variety, and not less than ninety-percent of any lot shall meet the color guide established for that variety", in that the Secretary knew or should have known, that that was never a "requirement", but was a determination made by the respective Committees and the respective Maturity Subcommittees, and the Secretary had never made that "requirement" before; it was also stated in the proposed rule with respect to maturity for Nectarines, Plums and Peaches, issued in April, 1988, that the Inspection Service had intended to use certain "color chips" and other maturity tests for Nectarines, Plums and Peaches in the 1988 season, implying that the Inspection Service had actually set those "maturity tests" or other "color standards", when the Secretary knew, or should have known, that the Inspection Service has never set those standards, but they have been set by the California Tree Fruit Committee, the respective Committees and their respective Ma-

turity Subcommittees — all made up of Petitioners' competitors;

(j) The Secretary, in adopting the "well-matured" standards, or re-adopting the "well-matured" standard, relies in part upon Mr. Thuerk's report which is attributed by the Secretary to state that the consumers do not want early-season fruit which is picked immature, but the Secretary fails to point out that such study states that consumers do not want "immature" fruit, which is not synonymous with "well-matured", and is different than fruit being just "mature";

(k) The Secretary also vacuously states, in response to a comment that the "well-matured" requirement has become more restrictive than it was when implemented in 1980, that only the number of color chips have increased but the "well-matured" standards had not become more restrictive, and the Secretary knew, or should have known, that his contention was contrary to evidence adduced at the *Wileman/Kash I* hearing;

(l) In responding to a claim that the "well-matured" fruit has caused a large increase in harvesting costs, the Secretary merely responds that the commentor "did not document this claim", but the Secretary knew, or should have known, that said claim was documented through the transcripts of the hearing that occurred with respect to the administrative petition filed by the same Petitioners and heard in February and March of 1988, which information was before the Secretary at the time the Interim Final Rule was issued;

(m) The Secretary also buttresses his claim that the "well-matured standard" has been well received by growers since at the last referendum, a majority of those voting favored continuance of the program, which ignores the fact that the referendum was conducted with respect to a contin-

uation or termination of the entire Marketing Agreement Order. There was no opportunity for line-item veto of any provision. In responding to a commentor's objection to the "well-matured" standard that it is done for the purpose of volume control as indicated by the decrease in packages shipped per acre from 1980 through 1987, even though a higher number of trees were planted per acre, the Secretary stated that this evaluation was inconclusive because the commentor did not consider other factors in addition to the "well-matured" requirement such as age of the trees, weather, cultural practices, and failure to meet other types of handling requirements such as minimum size requirements, and the Secretary knew, or should have known, that this contention was unfounded, or, at the very least, disputed and there was a complete failure by the Secretary to document his contention that there were less cartons per acre shipped since the "well-matured" standard came into existence based upon age of the trees, weather, cultural practices, and other handling requirements; and

(n) The Secretary failed to consider the comments with respect to the fact that the color standards or other maturity tests were not uniform, varied from variety to variety, causing some fruit to have a shorter shelf life than other fruit, causing some fruit to be left on the trees a much longer time after the fruit otherwise met a U.S. No. 1, than other varieties of fruit, and caused fruit that was shipped to the East Coast to arrive in an overripe condition. The lack of consideration to the drastically increased picking costs for having a "well-matured standard," in that said standard has required orchards to be picked five to seven times as opposed to two to three times, fails to address the comments that the said specific color chips or other maturity tests lacked any substantial basis and purpose, lacked any uniformity, lacked any studies and tests to determine the amount of fruit lost, or fruit wherein a decreased sales price was paid as a result of the overripe condition of the fruit.

The Secretary wholly failed to consider the testimony given under oath and the documents and exhibits presented at the *Wileman/Kash I* administrative hearing with respect to the precise issues stated in the Secretary's Interim Final Rules.

The 1988 maturity requirement procedure and variance procedures are substantially different than what has occurred in the past, and substantially different than what was proposed in the proposed rule, and it is the Secretary's doing that the matter was not first published until April, 1988.

The importance of an opportunity for meaningful submission to the Secretary of data and views and comments with respect to matters which materially and importantly affect members of the industry cannot be overlooked. With those submissions the Secretary is still bound to act in a reasonable manner and to relate to the submissions and viewpoints with respect to arriving at his decision. Where decisions are made and adequate explanation has not been given therefor, mere self-serving statements on behalf of the agency are not adequate. *Natural Resources Defense Council Inc. v. EPA*, 824 F.2d 1258 (1st Cir. 1987).

The importance of meaningful notice and comment and the opportunity for submission of views was long ago emphasized in *Walter Holm & Co. v. Secretary of Agriculture*, 449 F.2d 1009 (D.C. Cir. 1971) where the Court of Appeals for the District of Columbia considered the allegations of the Plaintiffs therein that the Department officials gave no independent judgment to important matters and indeed had no pertinent evidence at hand of the relative significance of the controverted size restrictions, but instead abdicated the decisionmaking function to the industry Committee and relied on the so-called expertise of its members.

The Court in that case found that the procedural rights of the Plaintiffs therein had been violated and in seeking a reasonable and balanced approach to the issues presented

the Court stated among other things that: "This is not an area that may rightly be approached in terms of absolute rigidity of requirements. It is not the law that all orders must be preceded by oral hearings when hearing is sought only on matters not involving material issues of fact * * * and it is not the case that all administrative actions legitimately denominated regulations are *ipso facto* freed from any need for oral hearings * * *." Instead, the Court indicated that:

> "The kind of procedure required must take into account the kind of questions involved. In this case we have a tie of restriction on domestic producers to restrictions on imports, issues of foreign policy involved in any decision importantly affecting imports * * *.
>
> " * * * the essential point is that a procedure not requiring an opportunity for oral presentation with the Department on crucial matters, and not requiring evidence in the record, is a feed bed for the weed of industry domination. *When the Secretary comes himself to make a determination of crucial facts and conclusions, he must think in terms of support in evidence and general standards, and cannot be guided solely by deference to industry desires* * * *.
>
> "We think the kind of underlying issue, involving as it does * * * requires oral presentation to the Department officials, that this right is available to them. *American Airlines* indicates that the oral hearing may be legislative in type although fairness may require an opportunity for cross-examination on the crucial issues. This requirement of hearing is not shackled by rigidities of procedure that may stultify the regulatory program. What counts is the reality of an opportunity to submit an effective presentation, to assure that the Secretary and his assistants will take a hard took at the problems in light of those submissions. (Emphasis added).

Obviously, the Court of Appeals in that case was concerned with the procedural aspects of the Administrative Procedure Act in light of the facts and circumstances of that case.

Anti-Trust Liability

The Respondent has sought a Finding of Fact that the Marketing Order Committees' members are immune from anti-trust liability. Alternatively, Respondent contends that determinations of anti-trust liabilities and possible remedies are beyond the scope of this proceeding. Finally in regard thereto, Respondent argues "* * * even if appropriate herein [any such arguments], are necessarily limited to the 1988 and 1989 seasons since the legality of the maturity regulation for prior years was expressly dealt with or waived in the *Wileman I* proceeding."

The Agricultural Marketing Agreement Act expressly provides in section 608b:

> In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful.

In support of its position the Respondent has relied upon *Berning v. Gooding* 820 F.2d 1550 (9th Cir. 1987) and *United States v. Borden*, 308 U.S. 188, 200 (1939). However, see earlier cases of *Maryland and Virginia Milk Producers Assn., Inc. v. United States*, 362 U.S. 458 (1960); *Cow Palace Ltd. v. Associated Milk Producers, Inc.* 390 F. Supp. 696 (D.C. Colo. 1975).

Wileman/Kash do not contend that the Nectarine, Plum and Peach Marketing Orders, *per se*, are subject to Federal anti-trust laws. What Wileman/Kash contend is that the Committees, the Maturity Subcommittees and the California Tree Fruit Agreement, do not fall within the exemption created by 7 U.S.C. § 608b for anti-trust violations.

The Supreme Court has construed anti-trust exemptions quite narrowly. See *California v. F.P.C.*, 369 U.S. 482, 485 (1962); *United States v. Philadelphia National Bank*, 374 U.S. 321; *United States v. Borden Company*, 308 U.S. 188, (1939); *Canter v. The Detroit Edison Co.*, 428, U.S. 579. 597, fn. 37 (1976).

Under the Agricultural Marketing Agreement Act, the Secretary of Agriculture is authorized to enter into Marketing Agreements with producers and processors, and such Agreements will not be invalidated because of their anti-competitive affects (*Bramsen v. Hardin*, 346 F. Supp. 934 (S.D. Fla., 1972); *Chiglades Farms, Inc. v. Butz*, 485 F.2d 1125 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). The Supreme Court has long recognized that the marketing of agricultural products is not *per se* immune from the Sherman Act. *Maryland and Virginia Milk Producers Assn., Inc. v. United States*, 362 U.S. 458 (1960); *United States v. Borden, supra.* Under the Act, *handlers* are therefore protected from antitrust prosecution when they sign or act pursuant to a valid marketing agreement, and compliance with an order is similarly protected from anti-trust prosecution. *Bramsen v. Hardin*, 346 F. Supp. 934, 941 (1972), *aff'd sub nom., Chiglades Farm Ltd. v. Butz*, 485 F.2d 1125 (5th Cir. 1973). *Bramsen* also held that the Secretary of Agriculture had no duty to determine the potential anti-competitive effects, of his orders before issuing them.

However, only the precise activities authorized or required by an order are protected from prosecution, and practices not literally legitimized by the order and "designed to achieve a monopoly position" in an industry are subject to anti-trust restraint. *Marketing Assistance Plan. Inc. v. Associated Milk Producers. Inc.*, 338 F. Supp. 1019 (1972), Anti-competitive activity carried out "under the cover" of Federal Marketing Orders may therefore be regarded in some circumstances for what they are, namely; namely to diminish competition and/or to drive out competition.

Successful anti-trust actions have been raised previously with respect to commodities governed by the Agricultural Marketing Agreement Act. *Marketing Assistant Plan, Inc. v. Associated Milk Producers, Inc.*, 380 F. Supp. 880 (W.D. Miss. 1974); *Marketing Assistant Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019 (S.D. Tex. 1972); See also *Maryland and Virginia Milk Producers Assn. v. United States*, *supra*, and *United States v. Borden*, *supra*.

What has been involved herein is something more than the imposition of regulation whereby there has been a reduction of competition in the public interest. There has resulted, under the color of law, preferences for certain members of the industry to the detriment of others and a restraining of trade to some, not applicable to all similarly situated.

The sovereign may not exempt private action from anti-trust violation nor may it give immunities to those whose actions are violative thereof by authorizing them to violate anti-trust laws, or by declaring that their actions are lawful. *Parker v. Brown*, 317 U.S. 341 (1943); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

It is clear that the Marketing Orders do not lawfully permit the Committees, the Maturity Subcommittees or the California Tree Fruit Agreement, to establish an "alter-ego"

private corporation for purposes of thwarting the laws of the United States of America. It is uncontradicted that the Tree Fruit Reserve, an allegedly "non-profit corporation," was established for the purpose of avoiding proscriptions and limitations placed upon the Committees and their agents by the Agricultural Marketing Agreement Act. (Tr. 2475-2476).

Wileman/Kash's assessment monies, ostensibly are used to pay "... such expenses as the Secretary may find are reasonable and are likely to be incurred by [the Commodity Committees], during any period specified by him ... for the maintenance and function of such authority and agency ..." (7 U.S.C. § 610(b)(2)(ii)). The collection of assessments is also authorized for "... any form of marketing promotion including paid advertising...." (7 U.S.C. § 608c(6)(I)). The Secretary, when he approves the budgets of the various Committees, is signing what he enunciates to the world to be expenses that are "reasonably and likely to be incurred" by the Committees. However, in reality, Nectarine, Peach and Plum Committees members and their agents are in a position to use assessment monies in an effort to protect their own special interests and advance their own economic gain emanating from decisions made by them. An example, is use of "supervisory" discretion. This is a significant power. Instead of changing the color standard, it is granted or withheld on a case by case basis.

Failure to abide by the Administrative Procedure Act and to make known, through the administrative process, elements which go into decisionmaking and the scope and breath thereof result in *individual* determinations as to the areas to which variances may apply. As counsel for Agricultural Marketing Service explained:

"Mr. Cooper: I said variance could be given for the whole area or could be given for a smaller portion.

Mr. Kemper: At the discretion of whom?

Mr. Cooper: It would be based on the determination that was made. Depend upon who made the determination * * *." (Tr. 3446).

Supervisory discretion is not an admitted relaxation of the color chip standard, but permits the supervisor to allow fruit to pass which does not meet it. It can be applied to any area. (Tr. 3451, 3452).

It appears that when the Tree Fruit Reserve Corporation was originally formulated, it was for the purpose of benefiting the tree fruit industry. However, over the years, those individuals in control of the Tree Fruit Reserve and the tree fruit industry (the Commodity Committeemen) have been in a position to distort the original purpose for the establishment of the Tree Fruit Reserve, with resultant personal economic benefits. For example, when it was first determined to purchase or build a building to house the office of the California Tree Fruit Agreement, it was because the industry was expending Four Thousand Dollars ($4,000.00) a year for rent which could more appropriately be applied to the purchase of their own facility. (Ex. No. 35). A review of the Minutes of the Tree Fruit Reserve, during the early sixties indicates that in November 1967, the Tree Fruit Reserve "now owes $1,164 on the building and the building will be free and clear in slightly over two months." (Ex. No. 87).

However, instead of complying with the original intent to discontinue the rent once the building was owned free and clear, the rent payments consistently increased each year. (Ex. Nos. 170-214). A review of the Minutes of the Tree Fruit Reserve references the fact that the rent paid to Tree Fruit Reserve from handler assessments increased to Fifty-Two Thousand Eight Hundred Dollars ($52,800.00) in 1988 (Ex. No. 165) and escalated to Seventy-Nine Thousand

Five Hundred Dollars ($79,500.00) for 1989. (Ex. No. 167). Upon termination or liquidation of the Tree Fruit Reserve, its assets do not revert to the tree fruit industry, a result contrary to the Marketing Orders' provision.

It was established through the testimony of Mr. LeRoy Giannini and Mr. Virgil Rasmussen (Tree Fruit Reserve Directors and "industry leaders") that these increases in rent in recent years were the result of Tree Fruit Reserve's employment of attorneys to represent the interests of a chosen few. (Tr. 2475-2476). Although it was understood that the building belonged to the commodities (the Plum, Peach and Pear growers) (Tr. 1946), the Directors of the Tree Fruit Reserve found it appropriate to escalate the rents in order to maintain funds and reserves to be spent on endeavors which were illegal for these individuals to expend as members of the Commodity Committees. (Tr. 2475).

The Tree Fruit Reserve attempts to justify charging rent to the California Tree Fruit Agreement in the amount of Seventy-Nine Thousand Five Hundred Dollars ($79,500.900) on the theory that this is the commercial rate. Mr. Jonathan Field, the Manager of the California Tree Fruit Agreement and the Secretary/Treasurer of the Tree Fruit Reserve, testified that the rent was established by "calling around" and seeing what other people are paying for rent and then the Executive Committee of the Tree Fruit Reserve established the rent: (Tr. 4712). This is a building that was paid off in 1967 with handler assessment monies. Mr. Field as Secretary/Treasurer of the Tree Fruit Reserve, establishes the rent to be paid each year by the California Tree Fruit Agreement. As the Manager of the California Tree Fruit Agreement, Mr. Field is the individual who must "negotiate" and use best efforts to secure the lowest price available on behalf of the tree fruit industry. The rental of office equipment and automobiles were also subject to

Mr. Field's decisions. What benefits incurred to the industry, as a whole, appear illusory.

With respect to the computer system, after several discussions on who should purchase the computer, the California Tree Fruit Agreement or Tree Fruit Reserve, the Committee Chairmen determined that the $78,000.00 computer should be purchased by the California Tree Fruit Agreement as an instrumentality of the United States Department of Agriculture at General Services Administration prices. If the California Tree Fruit Agreement were to purchase the computer, the California Tree Fruit Agreement would not be required to pay state sales tax, which amounted to approximately $4,000.00. The Committee Chairmen, voted to proceed with the purchase of the computer system by the California Tree Fruit Agreement. (Ex. No. 157).

A review of the California Tree Fruit Agreement's financial audit shows that the California Tree Fruit Agreement, in 1986, purchased a new press, a computer and software, and other office equipment, totalling $82,339.00. These items were purchased at the direction of Management Services Committee members, acting as agents for the Secretary of Agriculture, and also as members of the Executive Committee of the Tree Fruit Reserve. The $82,000.00+ cost was paid out of handler assessments. The item was not capitalized and depreciated over the estimated useful life, instead, the $82,000.00+ was listed as a yearly expense and the Secretary "rubber-stamped" this expense as reasonable and necessary. (Ex. No. 212). In connection therewith, the Secretary was advised by the accounting firm:

"Note 6 — FIXED ASSETS:

In accordance with the direction of the United States Department of Agriculture, it is the policy of California Tree Fruit Agreement to expense all fixed assets in the year purchased. Generally accepted accounting principles

require that fixed assets be capitalized and depreciated over their estimated useful lives.

In the current year, the following fixed assets were purchased and expensed:

New Press	$17,106
Computer Equipment and Software	57,762
Other Office	7,521
	$82,389

The Department of Agriculture was also advised: The effects on the financial statements of these practices are not reasonably determinable." (Ex. No. 212).

Although the purchase would appear appropriate, with no fanfare whatsoever, ten months after the California Tree Fruit Agreement used handler assessments monies to purchase $82,000.00+ worth of computer and equipment, the Chairmen of the various Committees, wearing the hat of the Management Services Committee, unanimously voted to transfer the computer and press from the California Tree Fruit Agreement to the Tree Fruit Reserve. (Ex. No. 162). Mr. Pinkham, Chairman of the Plum Committee and, therefore, both a member of the Management Services Committee and the executive Committee of the Tree Fruit Reserve, testified that it is the policy of the Committees to transfer assets to the Tree Fruit Reserve once they have either been depreciated or expensed. (Tr. 3505). Thus, $82,000.00+ worth of equipment, bought and paid for by handler assessments, was transferred at "salvage value" to the Tree Fruit Reserve within one year of its purchase.

By transferring the computer and the press to the Tree Fruit Reserve, it is no longer an asset of the California Tree Fruit Agreement. Now, the California Tree Fruit Agreement has need for the use of a computer. Thus, they rent this computer. along with all other office equipment, from the Tree Fruit Reserve.

Then, when the California Tree Fruit Agreement requests authorization for its expenses from the Secretary of Agriculture each year, one of the expenses listed is office equipment rental. Since office equipment rental has been submitted for Secretarial approval each season, such a budget item draws no special attention. The Secretary will approve expenditures for office equipment rental. The reality of this situation is that the tree fruit handlers, through their assessments, bought and paid for a computer and press in 1986. Now, for every subsequent year, the tree fruit handlers must continue to be assessed so that they might "rent" the same computer they purchased four years ago.

The ripening bowl, developed several years ago by the California Tree Fruit Agreement, was an extremely profitable endeavor. The ripening bowl is a plastic bowl which was marketed through the California Tree Fruit Agreement. The consumer places his/her fruit in this enclosed plastic bowl, the ethylene gas emitted from the fruit is trapped within the bowl, thus, accelerating the ripening process. The profits generated by the California Tree Fruit Agreement's sale of "ripening bowls," which the industry always believed was used for the benefit of the tree fruit handlers, presently goes directly to the Tree Fruit Reserve. (Ex. No. 167).

Respondent contends that the transfer of the ripening bowl income to the Tree Fruit Reserve was lawful conduct. Respondent argues that the ripening bowl was no longer viable and the California Tree Fruit Agreement employees were expending too much time and effort to make the project cost effective. However, this was not documented. The California Tree Fruit Agreement began marketing the ripening bowl in approximately 1978 and it became an immediate success. The ripening bowl was marketed through the California Tree Fruit Agreement office, and the administration of those sales was handled by the California Tree Fruit Agreement personnel (Tr. 4707).

The Minutes of the Management Services Committee meetings from November, 1978 through November, 1985 (Ex. Nos. 129 through 156), chart the progress and profitability of the ripening bowl. At the November 12, 1985, Management Services meeting, Mr. Sanderson, then Manager of the California Tree Fruit Agreement, points out that the industry was becoming bored with the ripening bowl; sales were down; it was therefore decided to discontinue production of the bowls. (It should be noted that the bowls had generated a balance of over $300,000.00 in net profits for the industry since its introduction in 1977). (Ex. No. 156).

Mr. Field, present Manager of the California Tree Fruit Agreement, testified that the ripening bowl was discontinued because of lack of sales and the marketing of the bowls was extremely time consuming for the California Tree Fruit Agreement personnel. Thus, the Committees decided to get out of the ripening bowl business. (Tr. 4707-4708).

A review of the joint Minutes of the Management Services Committee and the Executive Committee of the Tree Fruit Reserve, dated December 7, 1987 (Ex. No. 163), shows that, without discussion, the California Tree Fruit Agreement casually referenced that it was considering reintroducing the ripening bowl. Then, at the very next meeting, on May 3, 1988, the ripening bowl was voted back into existence. However, this time not by the California Tree Fruit Agreement, instead, the Tree Fruit Reserve would now market the bowl. (Ex. No. 164).

In a separate set of minutes, also dated May 3, 1988, which references a meeting of the Executive Committee of the Tree Fruit Reserve, Jonathan Field discusses the ripening bowl. Jonathan Field stated that the California Tree Fruit Agreement did not desire to reenter the ripening bowl business and suggested that the Tree Fruit Reserve handle

the sale of the bowl, as there was renewed consumer interest in the ripening bowl. (Ex. No. 164(A)).

In his testimony Mr. Field, in attempting to justify the transfer of the ripening bowl from the California Tree Fruit Agreement to the Tree Fruit Reserve, stated that although there was a profit made on the ripening bowls, the books did not reflect the amount of staff time that was used in selling the ripening bowl. In essence, he stated that there was a minimal profit, if any, made on the ripening bowls. (Tr. 4708-4709). Mr. Field testified that all remaining inventory and/or supplies relating to the ripening bowl were purchased by the Tree Fruit Reserve from the California Tree Fruit Agreement. He stated that there wasn't very much because the California Tree Fruit Agreement had been out of the ripening bowl business "for so many years" (one year). (Tr. 4709-4710). A review of the Tree Fruit Reserve Summary of Income and Expenses attached to the Minutes of the Executive Committee of the Tree Fruit Reserve, dated May 2, 1989 (Ex. No. 167), points out that ripening bowl income for the first year after its re-introduction exceed One Hundred Twenty-Five Thousand Dollars ($125,000.00) prior to expenses.

Respondent's contention that the Tree Fruit Reserve purchased *the rights to the ripening* bowl from the California Tree Fruit Agreement cannot be substantiated. Neither the financial statements of the California Tree Fruit Agreement nor those of the Tree Fruit Reserve show a bill of sale or transfer of funds from Tree Fruit Reserve to the California Tree Fruit Agreement for materials, product or the right to market the product.

The evidence introduced at the hearing established that income of the Tree Fruit Reserve is Generated from the syphoning off, through the California Tree Fruit Agreement, of handler assessment monies which is then used to promote the special interests of the various Commodity Committee-

men. This includes paying for the services of a private law firm to intervene on behalf of the "industry" to oppose Administrative Law Judge's rulings which fail to promote the various Committees' control of the industry. Handler assessment monies are also funneled through the California Tree Fruit Agreement to the Tree Fruit Reserve to hire private attorneys to assist the United States Attorney's office in filing briefs on behalf of various Committeemen charged with anti-trust violations. (Tr. 2482; Ex. No. 165). The Tree Fruit Reserve uses individual handler assessment monies to hire private law firms to conduct lobbying efforts on behalf of modifications to 7 U.S.C. § 608e(1), dealing with commodities imported into the United States and to lend support to the Grape and Tree Fruit League and the Alliance For Food and Fiber.

Wileman/Kash do not contend that it is illegal for a "private" corporation to expend its funds in the manner described above. However, it is argued that it is unlawful for the members of the Nectarine, Peach and Plum Committees to spend handler assessment monies in such a manner:

> "Attorneys of the office of the General Counsel (OGC) are available for advise and consultation on legal matters. Committees should request such assistance through the Marketing Field Offices. When available, OGC Attorneys will also help administrative committees in the preparation and presentation of testimony at hearings on program amendments. Thus, *Administrative Committees are prohibited from employing legal counsel. . . .*" United States Department of Agriculture, Agricultural Marketing Service, Internal Operations Manual, p. 47.

The members of the Nectarine, Peach and Plum Committees have devised a mechanism to circumvent the Secretary's regulations and Congress' intent in establishing the Agricultural Marketing Agreement Act. By creating their own private "alter-ego" corporation, they attempt to avoid

the restrictions that would otherwise make their conduct unlawful.

To compound what is clearly misuse of handler assessment monies for unlawful purposes, the actions and various tacit arrangements of the Tree Fruit Reserve are known to, and aided by, various employees of the Federal Government. At the instant hearing, it was established that various members of the Office of the General Counsel, employees of the Agricultural Marketing Service, and attorneys with the Untied States Attorney's office are, and have been, aware of the existence of the Tree Fruit Reserve.

Kurt Kimmel, the local Field Representative with the Fruit and Vegetable Division of the Agricultural Marketing Service, United States Department of Agriculture, was subpoenaed to testify, and did testify at the instant hearing. Mr. Kimmel testified that he was at virtually all of the joint Management Services Tree Fruit Reserve Executive Committee meetings as the liaison between the Committees and the Department of Agriculture. (Tr. 2693).

Mr. Kimmel admitted knowledge of the existence of the Tree Fruit Reserve, and further stated that he had told a number of people in Washington about its existence. (Tr. 2712). Mr. Kimmel further admitted that he was aware that the Tree Fruit Reserve was spending money on items that the Commodity Committees were not authorized by the Secretary of Agriculture to spend money on; he had known this for over two years when he became Agricultural Marketing Service's Representative. (Tr. 2711). Mr. Kimmel then acknowledged that the United States Department of Agriculture guidelines specify what the Committees can and cannot do. Mr. Kimmel explained that the Committees, or more specifically their Chairmen, are not allowed to lobby, nor, are they allowed to employ private attorneys without the permission of the Secretary. This approval was never sought. (Tr. 2703).

Mr. Kimmel admitted that the Commodity Committee Chairmen at their Management Services meetings discussed lobbying on behalf of amendments to Section 8(e) with respect to imported fruit. Mr. Kimmel stated that he had advised the Commodity Committee members that they were not allowed, pursuant to the United States Department of Agriculture regulatory guidelines, to lobby or provide funds to any association for the purpose of supporting such lobbying efforts. (Tr. 2707; Ex. No. 166). It is Mr. Kimmel's position that although the Commodity Committee Chairmen met in a joint session with the Executive Committee of the Tree Fruit Reserve, since all actions with respect to expending handler assessment monies for unlawful activities was through the Tree Fruit Reserve and not through the Management Services Committee, he was not concerned. (Tr. 2711).

The subservience of the Agricultural Marketing Service's representative to the will of the dominant forces of the industry is illustrated: For example, on February 21, 1986, the Management Services Committee, made up of the Chairmen of all of the Commodity Committees and also serving as the Executive Committee of the Tree Fruit Reserve, held one of their meetings. Mr. Sanderson, then Manager of the California Tree Fruit Agreement and Mr. Muck, then Field Representative for the Fruit and Vegetable Division of the Agricultural Marketing Service, were also present. There was a discussion with respect to providing money to the Grape and Tree Fruit League in support of the Alliance for Food and Fiber. Mr. Muck advised the Commodity Committee Chairmen that the Marketing Order programs were not allowed to fund the Alliance. This did not deter the Management Services Committee, as reflected in the Minutes of that meeting:

"Mr. Sanderson reported that he recently attended a meeting concerning the Alliance For Food and Fiber at

the Sacramento Airport. Ms. Pam Jones is the Director of this effort and at the meeting the Table Grape and Lettuce Commissions offered funding in the amount of $20,000.00 and $13,000.00, respectively, to try to counter adverse public opinion on the use of chemicals. Mr. Sanderson has been advised by Mr. Durando that the Grape and Tree Fruit League would soon request a contribution from the California Tree Fruit Agreement to support the Alliance. *Mr. Sanderson characterized the request as a 'sticky wicket' and said he is troubled by the implication of a Marketing Order program contributing to this organization.* Mr. Peterson [Al Peterson — Chairman, Peach Committee and President, Tree Fruit Reserve] said he had been contacted by Mr. Vern Crookshanks asking for support and contributions to the Alliance. Mr. Giannini [Leroy Giannini — then Chairman, Nectarine Administrative Committee and Director, Tree Fruit Reserve] had also been approached and he stated that the program involves developing and disseminating information designated to offset the poor image of agriculture from the use of chemicals. Mr. Sanderson asked whether the Alliance would be powerful enough to overcome a round sell of public opinion. The meeting in Sacramento was attended by perhaps fifteen organizations, including the Western Growers Association, Table Grape Commission and the League, also with three federal Marketing Order spokesmen. Two of the federal Marketing Order programs present expressed reluctance. Mr. Rasmussen (Virgil Rasmussen — then Chairman, Plum Commodity Committee, Director, Tree Fruit Reserve and Executive Committee, Tree Fruit Reserve] stated that the Table Grape Commission is *not* providing money *directly* to the Alliance but has arranged to contribute through the Grape and Tree Fruit League. Mr. Muck stated that *Marketing Order programs cannot fund the Alliance.*

Mr. Rasmussen suggested that *each commodity fund the project at $5,000.00* but not be committed beyond one year. It was moved by Mr. Pinkham [Patrick Pinkham — Chairman, Plum Commodity Committee, Director, Tree Fruit Reserve and Executive Committee, Tree Fruit Reserve,] seconded by Mr. Peterson and unanimously passed that *Tree Fruit Reserve* contract with the Grape and Tree Fruit League to provide $20,000.00 to fund the Alliance for one year based on adequate reporting of the activities and that CTFA *not* be named *directly* as a sponsor of the program." (Ex. No. 157). (Emphasis added).

It has been the position of Respondent that the Tree Fruit Reserve is not subject to the control of the United States Department of Agriculture. (Ex. No. 100). From such prospective, as long as the $20,000.00 did not come directly from the California Tree Fruit Agreement, all was well. Although the $20,000.00 was collected from handler assessments from each of the four commodities: Peaches, Plums, Nectarines and pears, no laws are broken because the Tree Fruit Reserve wrote the check because its funds are not subject to Government control. (Ex. No. 76). A United States Department of Agriculture representative was present and acquiesced to such conduct.

Respondent, rather than acknowledging the misdeeds of the Commodity Committeemen, in their capacity as Directors and Officers of the Tree Fruit Reserve, attempted throughout the instant hearing and in their Post-Hearing Brief to minimize the relevance of all Tree Fruit Reserve issues. Even with respect to the proof presented at the hearing that the Tree Fruit Reserve controls the activities of the California Tree Fruit Agreement, Respondent continues its denials.

Respondent contends that the California Tree Fruit Agreement employees, although working for the Tree Fruit

Reserve, were employed pursuant to contract and received remuneration for any time expended and work performed for the Tree Fruit Reserve. However, it must be remembered that the Manger of the California Tree Fruit Agreement, since the inception of the Tree Fruit Reserve in 1957, has been the Secretary-Treasurer of this so-called private non-profit corporation. No remuneration was forthcoming to the California Tree Fruit Agreement for services rendered until 1989 pursuant to the agreement between the California Tree Fruit Agreement and the Tree Fruit Reserve. (Ex. No. 30(C)). Respondent ignores the fact that the only reason for the creation of this contract was an attempt to rectify what had previously taken place.

Only after Government officials expressed their concern about the "relationship between the Tree Fruit Reserve, the Committees and the Chairmen," and suggested the drafting of an agreement for remuneration by Tree Fruit Reserve to the California Tree Fruit Agreement, did such a contract come into existence. In fact, until the Respondent expressed its concern as to the overlap of these various entities, nothing to separate these entities was even considered. (Ex. No. 165).

The Petitioners have set forth in their Post-Hearing Reply Brief, pp. 193-201 (which are incorporated herein by reference) the details of the power wielded by a few as to whom is to head up the California Tree Fruit Agreement office, inter-office relationships, what happened to a former Manager of the California Tree Fruit Agreement and why; special dispensations to Committee members, such as shipping "red-tag" fruit in violation of regulations; and unequal treatments of these Petitioners.

It is clear that there exists more than one set of rules. There are rules and regulations which are applied and enforced against the industry at large, and then there are the exceptions to those rules and regulations which are granted

to certain individuals, for whatever reason, who are in a position to exert power and control. Not all Committee Members may be categorized as "industry leaders." However, those involved in the Management Services Committee and the Tree Fruit Reserve have assumed the power to grant and/or secure variances from the color chip designations for themselves and to avoid the other rules and regulations, thus, allowing them to pick, pack and ship their fruit where others in the industry may not.

Another California Tree Fruit Agreement program which fails to withstand even slight scrutiny are the "market tours" paid for by the California Tree Fruit Agreement — once again with handler assessments monies. One particular "market tour" which was referenced in the instant hearing dealt with the tour of various packing facilities by the buyer representatives for "Lucky Markets," a chain grocery store operation. The stated purpose of these tours, similar to the "Lucky tour," is to bring buyers to see Peaches, Plums and Nectarines in the picking and packing stage and to familiarize them with these industry operations. (Tr. 3394-3398).

The "Lucky tour" took two days, June 21 and 22, 1989. The California Tree Fruit Agreement rented a bus, picked up the buyers for Lucky Stores at the Modesto Airport and transported them to the various packinghouses. This tour was an all expense paid trip for the Lucky Store buyers, paid for by handler assessments. It included breakfast, lunch (two days), cocktail hour, dinner and lodging at the Holiday Inn in Visalia.

Wileman/Kash question how they might benefit from their assessments being expended on this form of promotional tour? Wileman/Kash's packinghouses were not requested to be involved in the tour, nor were they even advised that such a tour was conducted. A review of the itinerary for this particular tour makes it readily apparent

why these tours are conducted. The packinghouses visited included:

Wawona — Operated by Al Peterson, Chairman Peach Commodity Committee; Chairman, Management Services Committee; President, Tree Fruit Reserve Corporation; Chairman, Executive Committee Tree Fruit Reserve Corporation. (Tr. 2403-2404).

George Bros. — Owned and operated by Mickey George, Chairman, Nectarine Administrative Committee; Director, Tree Fruit Reserve Corporation; member, Executive Committee Tree Reserve Corporation. (Tr. 2399).

Sadoian Packing Co. — Owned and operated by Cliff Sadoian, member, Peach Commodity Committee. (Tr. 2399).

Mineral King — Packing Coop. owned in part by Patrick Pinkham, Chairman, Plum Commodity Committee; member, Management Services Committee; Director, Tree Fruit Reserve Corporation; member, Executive Committee Tree Fruit Reserve Corporation. (Tr. 2399).

Ito Packing — Owned and operated by Jimmy Ito, member, Nectarine Administrative Committee, and owner of the patent on the Red Jim nectarine. (Tr. 2399).

Ballentine Produce — Owned and operated by Virgil Rasmussen, past Chairman, Plum Commodity Committee; past Chairman, Management Services Committee; Chairman, Control Committee of CTFA; past President, Tree Fruit Reserve Corporation; past Chairman, Executive Committee Tree Fruit Reserve Corporation. (Tr. 2400).

The dinner for the "Lucky tour" buyers was attended by the Commodity Committee Chairmen, while lunch the following day was with Mr. Virgil Rasmussen, one of the admitted "industry giants." (Ex. No. 239).

Wileman/Kash can certainly understand the benefit that is derived from conducting tours such as the one for the Lucky Store buyers and the expectation of a beneficial future relationship. However, those benefits are limited to the packinghouses which were invited to be part of the tour. The Lucky buyers made contact with only those packinghouse operations that the California Tree Fruit Agreement designated. Obviously, it was just a coincidence that the packinghouses visited on this tour were affiliated with the Commodity Committees and the Tree Fruit Reserve members. What possible benefit is provided to the tree fruit industry by the "Lucky tour?" Assuming that the Lucky Store representatives were impressed by the tour, when it comes times to purchase tree fruit for the Lucky Store organization, the buyers will call Messrs. Peterson, George, Pinkham, Ito, or Rasmussen. They will not call neither Messrs. Elliott, Chang or Kashiki. The handler assessment monies expended for these actions of self-interest will benefit that portion of the industry that the Committee Members intended that money to benefit, themselves.

Every grower and handler wants to promote his own product. If he gains some advantage, by reason of the proper promulgation, administration, and interpretation of the Order provisions, he cannot be faulted for such advantage. This is clearly distinguishable from a situation composed of lack of *bona fide* transactions, conflicts of interest, and the interpretation and administering of an order to the economic benefit of those who control. To the extent such situations exist, they are beyond the area of responsibility or permission flowing from the Secretary — nor does he have authority to circumvent Congressional intent and purpose.

Of the 22 witnesses testifying in *Wileman/Kash II*, all but 7 thereof were Committee members, employees of Committee members, an employee of Respondent, or employees of the State of California as Federal-State inspectors.

Very careful evaluation has taken place as to the weight and credibility to be given the testimony of the testifying witnesses, a number of whom served in dual capacities in the California Tree Fruit Agreement and the Tree Fruit Reserve. Not only was there a reluctance of some to testify, but there were instances where knowledgeable successful businessmen or Government employees had severe cases of forgetfulness or feigned a lack of knowledge as to the meaning of commonly used expressions and everyday business matters with which they were associated. A number of the witnesses were not eager to reveal the information being sought on examination.

I do not believe it necessary, for Petitioners to prevail, that a determination be made herein as to anti-trust liability of the Committee members. It is enough that the record as a whole shows that regardless of what the maturity laws are with respect to Nectarines, Plums and Peaches for the 1988 and 1989 harvest seasons, and the years preceding, the Commodity Committee members, without any authority and contrary to any law which may be applicable, cannot intentionally violate that law, ignore the law and conceal from the rest of the industry, including Wileman/Kash, their true intent and motivation. When Wileman/Kash are restrained as competitors, competition in the market place is diminished, and, at the same time, there is increased production and marketing of Nectarines, Plums and Peaches by their competitors. Under the circumstances herein, the private non-profit corporation provides no cloak for such actions.

The Commodity Committees, through the use of the Tree Fruit Reserve and with the assistance of the California Tree Fruit Agreement, established and maintain the "well-matured" maturity standards, not the Secretary.

The Supreme Court has foreclosed the question with respect to whether or not a Committee of competitors can

make laws preventing and restraining their competitors. The Supreme Court in *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936), absolutely holds that a Committee of competitors cannot make law. In the present case, the power conferred or assumed by the majority, is, in effect, the power to regulate the affairs of an unwilling minority.

In addition to the cases cited earlier herein, the Supreme Court, in 1980, decided the case of *Industrial Union v. American Petroleum*, 448 U.S. 607 (100 S.Ct. 2844) 1980. There, the Court considered a situation much less egregious to that presently before this tribunal. In *Industrial Union, supra*, the Court considered the authority granted to the Secretary of Labor by the Occupational Safety and Health Act of 1970 (OSHA) to promulgate standards for safe and healthful working conditions. The Court indicated at 448 U.S. 608:

> "By empowering the Secretary to promulgate standards that are reasonably necessary or appropriate to provide safe or healthful employment in places of employment; as required by § 3(8), the Act implies that, before promulgating any standard, the Secretary must make a finding that the work places in question are not safe."

In upholding the lower Court's decision that OSHA had exceeded its authority in promulgating a new standard, the Court stated at 448 U.S. 614-615:

> "We agree with the Fifth Circuit's holding that § 3(8) requires a Secretary to find, as a threshold matter, that the toxic substance in question poses a significant health risk in the work place and that a new, lower standard is therefore reasonably necessary or appropriate to provide safe or healthful employment in places of employment."

The most important part of the Supreme Court holding in *Industrial Union, supra*, is stated at page 646:

> "If the government was correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry Co. v. United States*, [Citations omitted], and *Panama Refining Co. v. Ryan*, (Citations omitted). A construction of the statute that avoids this kind of open-ended grant should certainly be favored."

The United States Department of Agriculture, in prior arguments, has placed much emphasis on the fact that the Committees of competitors were impliedly delegated authority by the Secretary of Agriculture to create maturity standards, change maturity standards, or deny a variance from maturity standards. This delegation occurred by the Secretary "rubber-stamping" the Committees' "well-matured" color chip designations for 1988 and 1989. However, even if the Secretary did validly approve of said conduct, it cannot be condoned under the holdings of the above-cited cases. For if the Secretary's actions are deemed sufficient, said delegation would be unconstitutional.

Sections 916.70 and 917.68 (Title 7 C.F.R.) appear to grant limited immunity from liability to members and employees of the Committees "except for acts of dishonesty, willful misconduct or gross negligence." However, the Secretary cannot issue a regulation (like §§ 916.70 and 917.68) which would exempt members of the Committees, or their employees, from violating anti-trust laws, which are not among the statutes he enforces, so that it is not necessary to determine whether or not a violation of anti-trust laws involves acts of dishonesty, willful misconduct, or gross

negligence. It certainly may fall within the former two categories but with the Supreme Court cases clearly on point, any attempt by the Secretary to exempt Committee members from anti-trust laws would be invalid.

The Supreme Court, in reviewing the Agricultural Marketing Agreement Act, has made it quite clear that "the Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner." *United States v. Borden Company, supra*, 308 U.S. at p. 199. The Supreme Court in *Borden* went on to state:

> The Agricultural Act declares it to be the policy of Congress 'through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in the interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period described to carry out that policy a particular plan is set forth. *'Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements that they desire, regardless of the restraints which may be inflicted upon commerce.'* " (Emphasis added). *Id.*, p. 199

As the Court further held:

> "To give validity to marketing agreements the Secretary must be an actual participant in the agreements. § 8(b) [Fn. omitted]. The orders are also to be made by the Secretary for the purpose of regulating and handling the agricultural commodity to which the particular order relates. § 8(3)(4) (Fn. omitted]. That the field covered by the Agricultural Act is not coterminous with that

covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding *under the authority specifically confirmed by Congress.* As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched." (Emphasis added). *Id.*, at pp. 199-200.

The Supreme Court went on to state that the Secretary shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers and others engaged in handling of any agricultural commodity. The Court further stated that said "agreement" shall not be held to be in violation of the anti-trust laws of the United States, however:

> "These explicit provisions requiring official participation and authorization shows beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. [Fn. omitted]. *If Congress had desired to grant any further immunity, Congress undoubtedly would have said so.*" (Emphasis added). *Id.*, at p. 201.

The United States Department of Agriculture can hardly claim official immunity for actions taken by the Commodity Committee members which were expressly delegated to the Federal-State Inspection Service. The Commodity Committee members have exercised executive discretion and policy making where they have not been so empowered. As stated recently by the United States Supreme Court in

Berkovitz v. United States, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988):

> "Thus, the discretional function exception will not apply when a federal statute, regulations or a policy specifically prescribed a course of action for an employee to follow. In the event, the employee has no rightful option but to adhere to the directive . . ." *Id.*, at p. 1958.
>
> "In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the government's argument, pressed both in this Court and the Court of Appeals, that the exception precludes liability for any and all acts arising out of regulatory programs of federal agencies. That argument is rebutted first by the language of the exception, which protects 'discretionary' functions rather than 'regulatory' function." *Id.*, at pp. 1959-1960.

It cannot be said that the Commodity Committee members had an "official duty" to hold clandestine private non-profit corporate meetings, not open to the public, with no notice to the public, wherein they set the maturity standards, and ran the business of the Commodity Committees and the California Tree Fruit Agreement. Further, the regulations issued by the Secretary in 1988 still required the Federal and Federal-State Inspection Service to impose the maturity requirements. It cannot be inferred that the Committees have the authority to actually make "law," particularly hidden from view within the confines of the Tree Fruit Reserve, for to do so would violate the exact proscriptions laid out in *Carter v. Carter Co., supra.*

In a recent Supreme Court decision, *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 108 S.Ct. 1931, 100

L.Ed.2d 497 (1988), in determining whether or not private competitors had anti-trust immunity, the Court stated:

> "Whatever *defacto* authority the association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the association is composed, at least in part, of persons with economic incentives to restrain trade. [Citations]. 'We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.' [Citation]. The dividing line between a restraint resulting from governmental action and those resulting from private action may not always be obvious. But whereas here the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action." *Allied Tube, supra*, 108 S.Ct., at pp. 1937-1938.

The Supreme Court in Allied went on to state:

> ". . . we hold that at least where, as here, an economically interested party exercises decision making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any anti-trust liability from the effect the standard has on its own force in the marketplace." *Id.*, at p. 1942.

There is nothing in the declared policy of Congress nor in the Peach, Plum and Nectarine Orders which bestows upon private industry the powers of making law, changing law, refusing to change the law set by themselves, and causing discriminatory enforcement of the law with the foreseeable result of restraining or diminishing competition. *Wileman/Kash I* set forth the importance of "timing" and shipping

during windows of opportunity (mostly at the beginning of the harvest seasons). Even if the Secretary had "approved" same, by inaction, non-disapproval, or inattentiveness, this is not the sort of approval referred to in *Berning v. Gooding, supra*.

This principle set forth in *Allied* has recently been considered by the United States Supreme Court in *City of Columbia, et al. v. Omni Outdoor Advertising, Inc.* (No. 89-1671, April 1, 1991). There the Court clearly reorganized the difference between situations in which persons use the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon. One is not entitled to achieve governmental results through improper means.

Approval Process

The last contention of Petitioners to be addressed at length relates to the validity of the approval process for expenditures and to the imposition of assessments — were they arrived at and made in accordance with law. The examination thereof, in this case, results in a departure from *Wileman/Kash I* because of the nature of the pleadings herein, the voluminous evidence, and a factual set of circumstances which differs in some respects.

In my decision with respect to the *Wileman/Kash I* case I indicated that I was of the opinion that the approval process of the assessments was in accordance with law based upon the evidence presented in that case. Although this opinion was adhered to by the Judicial Officer in his decision on the *Wileman/Kash I* case, I am now of the opinion, based upon additional legal precedents which have come to my attention, as well as the additional evidence, setting forth the facts in greater detail, that my opinion in the original *Wileman/Kash I* case should not be adhered to. Among my reasons for this are the facts which flow from extensive testimonial evidence and certain stipulated evidence in this

case, such as Exhibits 31, 32, 33 and 297 and all subparts thereof. Exhibit 33 was stipulated to as being the total rulemaking record relative to advertising assessments for Peaches, Plums and Nectarines. Exhibit 297 was stipulated to as being the "Budget Approval Record" and as being the entire budget, and all supporting documents thereto, which the Nectarine, Plum and Peach Committees submitted to the Secretary of Agriculture for his approval each harvest season from 1980 through 1989.

Also, in *Wileman/Kash I* the issue of retroactivity of the assessments was not addressed. The Judicial Officer's final decision in *Saulsbury Orchards and Almond Processing Inc., et al.* AMA Docket No. F&V 981-4 (January 23, 1991) indicates that he *did not consider*, in *Wileman/Kash I*, that retroactivity was directly raised. It is not disputed herein that the assessment amounts are determined retroactively and it is not disputed that the Tree Fruit Reserve expended sums, derived mostly from rents from assessments paid to the California Tree Fruit Agreement, on attorney's fees and lobbying expenditures illegal for the Secretary to make or approve, thus being a factor in the approval process.

The Respondent's position is clear: Because, sometime in the distant past at rulemaking hearings, the Secretary was given the authority, if he chose, to implement procedures to have paid advertising. From that initial authorization, the Respondent argues that everything the Secretary did after that fell within the parameters of that authorization. Authorization to advertise is not the equivalent of an advertising program which has increased steadily through the years to the extent that it now comprises approximately fifty percent of the assessments imposed upon the handlers. Nor did such initial authorization intend to include procedures whereby, through payment of excessive rents, amounts would be expended for lobbying and attorney's fees, contrary to the Agricultural Marketing Agreement Act, or to devise a

vehicle to be a conduit to avoid the provisions of the Agricultural Marketing Agreement Act in the event of termination of the Orders.

The Secretary of Agriculture, for each harvest season, has applied the advertising and expense assessments retroactively. Each harvest season, the Secretary sets the effective date for the imposition of assessment rates to commence on the first day of the harvest season which is the first of March. (7 C.F.R. §§ 916.227, 917.250 and 917.251).

For the 1988 and 1989 harvest seasons, the Secretary issued his final order with respect to advertising and expense assessments on July 19, 1988 (Exhibit No. 33(M)), and on July 20, 1989. (Exh. No. 33(A)). A review of the advertising and expense assessments for each season from 1979 through 1987 (Exhibit No. 7, A.B. 21-32) establishes that this has been the Secretary's usual procedure since 1979.

The harvest season commences on March 1st each year. The handling of Nectarines, Peaches and Plums commences approximately May 15th-20th of each year. Yet, the final rule with respect to advertising and expense assessments was not published until July 19, in 1988 and July 20, in 1989. Inasmuch as the Secretary's advertising and expense assessments are retroactively applied to all tree fruit received by handlers after the harvest season begins on March 1st, it is retroactive and not in accordance with law.

The Nectarine, Plum and Peach Committees submit their proposed budgets and recommended assessment rate per carton after their spring meetings, which occur, each season, approximately the first week in May. There is no explanation why the Committees do not submit their recommendations to the Secretary prior to May, each season.

Each harvest season, farmers, including the Committee members, in seeking crop loans must submit their estimates and budgets to the loan institutions as early as November.

Thus, the lending institutions and the growers have estimated the following season's crop well before the commencement of the next harvest season. Yet, recommendations are not submitted to the Secretary of Agriculture with respect to advertising and expense costs until the May meetings. (Tr. 1269).

Were the Committees to submit estimated recommendations to the Secretary, there is no reason why the Secretary would not have time to review those recommendations and complete his rulemaking, at least interim rulemaking, well before handlers commence their handling of the tree fruit in May. Yet, instead, the Secretary *issues his final rule some nine (9) weeks after the commencement of the harvest season, making it retroactive to March 1st.* Each harvest season the Secretary then announces that:

> "... good cause exists for not postponing the effective date of this action until thirty (30) days after publication in the Federal Register." (Exhibit Nos. 33 (M) and 33 (A)).

Inasmuch as the final rules apply to all tree fruit received by handlers from March 1st, it is unquestionably retroactive. As such, it is the kind of rulemaking action which the Courts have held invalid without express statutory grant. Although the Secretary has the authorization to adjust the assessments, during the harvest year, if events so warrant it, this is not sufficient basis for not making the initial assessments well in advance.

Courts have determined that there are limitations on permissible retroactive rulemaking, and the relevant factors include the degree of retroactivity, the need for administrative flexibility and the hardship on affected parties. *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 606 F.2d 1094 (D.C. Cir. 1979) *cert. denied*, 100 S.Ct. 1284 (1979). Courts frown on retroactive application when the rule has not been preceded by formal rulemaking requirements requesting input from interested or affected parties. As previously noted, there is no satisfactory avenue for the affected handlers to make known to the Secretary their views as to correctness of the proposed expenses. Committees meetings do not suffice. *Montana Power Co. v. Environmental Protection Agency*, 429 F. Supp. 683 (D.C. Mont. 1977). Furthermore, Courts have held that retroactive agency policy-making and/or rulemaking is disfavored when the ill effects of such application outweigh the need of immediate application, or when the hardship on affected parties will outweigh the public ends to be accomplished. *Iowa Power and Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796 (1981) *cert. denied*, 102 S. Ct. 1253 (1981).

The Supreme Court of the United States recently had occasion to consider an agency's power to promulgate regulations. The Supreme Court in *Bowen v. Georgetown University Hospital, et al.*, 109 S.Ct. 468 (1988), found that the 1984 reinstatement of a 1981 rule was invalid. In so ruling, the Court indicated that an administrative agency's power to promulgate regulations is limited to the authority delegated by Congress. More specifically, the Court unanimously stated that the threshold question was whether the legislation in question authorized retroactive rulemaking:

> "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires that result ... by the same principal, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encumbrance the power to promulgate retroactive rules unless that power is conveyed by Congress in expressed terms...." *Id.*

The Court was cognizant that in the interim forty years since the passage of the Administrative Procedure Act, the

Court "... has never directly confronted whether the statute authorizes retroactive rules. This in itself casts doubt on the Government's position ..." *Bowen v. Georgetown University, supra.*

Justice Scalia joined in the opinion of the unanimous Court by concurring and writing a separate opinion wherein he reiterated that the most authoritative interpretation of the Administrative Procedure Act was the 1947 Attorney General's Manual on the Administrative Procedure Act to which the Supreme Court repeatedly has given great weight. The profound thought given to this previously unconsidered area by the Supreme Court is reflected in Justice Scalia's opinion:

> "That document was prepared by the same office of the Assistant Solicitor General that advised Congress in the later stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the act.' AG's Manual 6. Its analysis is plainly out of accord with the government's position here:
>
> > Of particular importance is the fact that 'rule' includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of future effect, implementing or prescribing future law.
> >
> > [T]he entire act is based upon a dichotomy between rule making and adjudication ... rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations ... conversely, adjudication is concerned with the determination of past and present rights and liabilities. *Id.*, at 13-14.

> "These statements cannot conceivably be reconciled with the government's position here that a rule has future effect merely because it is made effective in the future. Moreover, the clarity of these statements cannot be disregarded on the basis of the single sentence, elsewhere in the manual, that '[n]othing, in the act precludes the issuance of retroactive rules when otherwise legal and accompanied by the findings, required by Section 4(c).' *Id.*, at 37. What that statement means (apart from the inexplicable reference to Section 4(c), 5 U.S.C. § 553(d), which would appear to have no application, no matter which interpretation is adopted, is clarified by the immediately following citation to the portion of the legislative history supporting it, namely, H. Rep. No. 1980, 79th Cong., 2d Sess., 49, n. 1 (1946). That Report states that '[t]he phrase 'future' effects does not preclude agencies from considering and, so far as legally authorized, dealing with past transactions and prescribing rules for the future.' *Ibid.* The Treasury Department might prescribe, for example, that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered non-taxable will be taxable — whether those trusts were established before the effective date of the regulation. That is not retroactivity in the sense at issue here, i.e., in the sense of altering, the past legal consequences of past action. Rather, it is what has been characterized as 'secondary' retroactivity, see *McNulty, Corporations and the Intertemporal Conflict of Laws*, 55 Cal. L. Rev. 58-60 (1967). A rule with exclusively future effect (taxation of future trust income) can unquestionably affect past transactions) (rendering the previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA. Thus, with respect to the present matter, there is no question that the Secretary could have applied her new wage-index formulas to respondents in the future, even

though respondents may have been operating under long-term labor and supply contracts negotiated in reliance upon the pre-existing rule. *But when the Secretary prescribed such a formula for costs reimbursable while the prior rule was in effect, she changed the law retroactively, a function not performable by rule under the APA.*" [Emphasis added].

Bowen, supra, especially the concurrence by Justice Scalia, demonstrates that the Supreme Court does not look kindly upon an agency's attempt to promulgate rules which have a retroactive effect. Justice Scalia indicated that the Administrative Procedure Act meant what it said and there was no reason to think that Congress varied therefrom.[6]

The 1989 market development "generic" advertising budget was in excess of Five Million Dollars ($5,000,000.00). Of that $5,000,000.00+, 56 percent, or well in excess of $2,500,000.00 was expended on television and radio production. (Ex. No. 348). With respect to the $2,500,000.00+ which was expended on radio and television production, in excess of $2,000,000.00 was expended prior to the Secretary authorizing any expenditure whatsoever. Although there was some evidence that some of the recipients may have been aware that receipt of their funds was dependent on the Secretary's approval, nevertheless, such funds were committed *prior* to the Secretary's approval. The same advertising firm could rely upon its expected, or actual, income prior to the harvest season.

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[6]It is not known the application the Judicial Officer may, or may not give this case and that of *Air Transport Ass'n of America v. Depart. of Transportation* 900 F.2d 369 (D.C. Cir. 1990) *cert. granted*, as *Dept. of Transportation v. Air Transport Ass'n of America*, 111 S.Ct. 669 (January 7, 1991). Judgment vacated and remanded to consider question of mootness. See Ruling on Certified Questions May 1, 1991, *supra*.

Exhibit No. 350 as prepared by Jonathan Field, shows that 86.3% of the entire advertising budget is expended in the first eight weeks of the harvest season. The harvest season commences on or about May 15th-May 22nd. In 1989, the Secretary authorized the Committees' budgets on July 20, 1989. (Exh. No. 33(A)). Therefore, at the time the Secretary authorized the expenditure of $2,500,000.00+ for advertising, the Committees, through the California Tree Fruit Agreement, had already spent, or committed for expenditure, most of the money allocated. Yet, the assessments were levied for all fruit which was picked and packed prior to the effective date of each year's assessment regulations.

A review of the Secretary's assessment regulations from 1979 through 1989 establishes that, through the last decade, virtually the entire advertising budget was expended well before the Secretary authorized any expenses to be incurred or assessments collected. (Ex. Nos. 7, A.B. 21-32; 33(A); 33(M)).

Although the Judicial Officer is of the opinion that retroactivity is permissible, his opinion in *Saulsbury, supra*, reveals he is more concerned with *administrative* malfunction and inconvenience. He has stated, in part: That the Petitioners therein were simply attempting to find some legal technicality to relieve them of assessment obligations. Moreover, the Judicial Officer stated:

"Finally, even if the rule is found to be retroactive, and if the holding in *G. U. Hosp.* is found to apply, the rule is nevertheless permissible as any retroactivity is specifically authorized by the authorizing statute, the AMAA. The AMAA provides that each order 'shall provide that each handler subject thereto shall pay to [the Board] such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by [the Board], during

any period specified by him . . . ["](emphasis added) 7 U.S.C. 610(b)(2)(ii). Pursuant to this authority the Secretary, in Order 981, has established the crop year as the specified period. As petitioners themselves note (Tr. 321), the Board and the Secretary must have a reasonable estimate of the crop to permit the procedure to operate. That can not happen until mid-July at the earliest which is after the start of the crop year established by the Secretary pursuant to the authority provided to him by the AMAA to specify the applicable period. Thus the Secretary has ruled that assessments shall be on all almonds received by a handler during a crop year (7 C.F.R. 98.18) and the rate must be based on an estimate which can not occur horticulturally until after the crop year has begun and will, by prospective rule 7 C.F.R. 981.81, apply to all almonds handled during the crop year.

"* * * it is no longer my view that the assessment rate must be included in a regulation. * * * However, there is nothing in the Agricultural Marketing Agreement Act of 1937 that requires that a handler's assessment obligations be set forth in a regulation. (See 7 U.S.C. § 608c(6)(I), 610(b)(2)(ii)-(iii)). Since the Order, published in the Federal Register after a formal rulemaking hearing, expressly requires handlers to pay their pro rata share of expenses approved by the Secretary, and expressly authorizes retroactive assessment determinations (7 C.F.R. § 981.81), it is my present view that the Secretary could notify handlers by personal notice or otherwise of their assessment obligations, without issuing a regulation.

"If the rules imposing the assessment rates from 1980-81 through 1988-89 were *invalid because of retroactivity* (which is not the case), this could not be cured by any new rulemaking procedure, but consideration would still have to be even as to whether reimbursement is just and

reasonable considering all of the circumstances, whether laches would preclude recovery for some of the years, and whether all handlers should voluntarily be reimbursed by the Secretary.* * *"

If the imposition of assessments had been subject to rulemaking where handlers and others, including the general public, would have opportunity for input, and, the assessments were made prospective, these Petitioners would have little merit to this aspect of their arguments. But, the facts herein show otherwise. Certainly, the amount of assessments levied as to each handler can have a direct impact on his business judgments. Presently, there is no forum where meaningful input and consideration can be achieved as to the pros and cons of paying the Tree Fruit Reserve high rents for lease of a building and office furniture and cars, and the resultant expenditure of such amounts through the Tree Fruit Reserve for lobbying and attorney's fees. The present process precludes the submission of alternatives and such preclusion manifests itself in the retroactive assessments, most of which have been spent before such determination is made.

Moreover, such actions are contrary to original intent as reflected at the oral hearing considering whether there was a need for a Federal Marketing Order relative to the handling of Nectarines grown in California. (Docket No. OA-303, March 20, 1958). The testimony of one of the proponents, Mr. James Laird, indicates among other things, with respect to the authorization of the proposed Nectarine Committee: "The Committee should have the duty of establishing an office, and, if it appears to be in the interest of the industry, a working out space and management arrangements with some other industry fruit office. *The Committee should consider the cost of operation as a matter of primary concern and operate as economically as possible consistent*

with the effective performance of its duties." (Tr. 334, 335 of that hearing). (Emphasis added.)

In addition, Mr. Laird indicated in his testimony that as to the duty of the Committee to prepare a budget of expenses and recommend a rate of assessments to the Secretary that: "*This, of course, should be done at the start of each fiscal year* * * * growers and handlers likewise should be informed as to the budget, as they have a right to know what is being done with the money they will pay to the committee to cover its operating expenses." (Tr. 335 of that hearing).

There are no express provisions for retroactive rulermaking in the Agricultural Marketing Agreement Act. Moreover, when the Marketing Order was promulgated, there was recognized the need to issue rules before the handling of fruit begins in mid-May and designated March 1st as the start of each crop year to allow adequate lead time for rulemaking.

The Secretary did not have "good cause" for dispensing with rulemaking requirements. Moreover, by the time the Secretary signed the final rule and began enforcing his regulations, the retroactive assessments owed amounted to a significant amount of money which did, in fact, impose an economic hardship on all handlers. The Secretary has no authority to retroactively force handlers to pay said assessments.

In reality, as the process now works, the Secretary has unfettered discretion to set the assessment rates at any level he deems "reasonable." When this determination as to "reasonableness" is not subject to meaningful public and handler scrutiny, one is left without guidelines or restrictions. If there is opportunity for interested persons to have meaningful input then a reviewing Court has basis for determining if the Secretary acted arbitrarily and capri-

ciously or in an unreasonable manner when he includes certain items in the expense category. Surely, there must be boundaries beyond which the Secretary may not go. Even "reasonableness" has its bounds. For instance, what if the various Committees decided, for one reason or another, to increase expenditures for advertising to Fifty Million Dollars ($50,000,000.00) a year, and, the Secretary for reasons known only to himself, approved same under the guise of being good for the fruit industry and furthering the objectives of the Agricultural Marketing Agreement Act. Such approval process would put a lot of people out of business but would it be reasonable? Although the members of the various Commodity Committees are familiar with the industry, they have inherent self economic interests to promote, and the reasons underlying their recommendations must be weighed in light of the entire industry and the Agricultural Marketing Agreement Act. The recommendations of the Committees and the approval process do not, *per se*, acceptably establish reasonableness and non-arbitrary and non-capricious acts.

The Respondent maintains that the Secretary's approvals of the Committees' budgets are not subject to rulemaking at all, but are matters left to the discretion of the Secretary.

Where an agency must make a determination, such agency must form a judgment predicated upon factual circumstances. Such determination, even if discretionary, is not automatic, nor is it a matter of absolute agency discretion. Administrative legal process encompasses the due process clause of the United States Constitution (Fifth Amendment). Due process may not be dispensed with in administrative procedure. *Chernin v. Lyng*, 1 AdL.3d 560 (8th Cir. 1989).

Where there had been no delegation or a concise setting of parameters within which a Government employee functions, it is not inappropriate to examine and make findings of

fact concerning the policy of such functions, the degree of discretion allowed, and whether such discretion as existed was grounded in social, economic, or political policy. *See, Irving v. United States* (Ct. App. 1, No. 89-1365 (July 25, 1990)) where the Court indicated that the discretionary function exception to Government's waiver of sovereign immunity in the Federal Tort Claims Act does not automatically preclude suit against the Occupational Safety and Health Administration for negligent inspection, but depends on the amount of discretion actually held and exercised by the inspector, which required specific findings of fact.

It is further argued by the Respondent that according to the rulemaking records the Committees are required to include their proposed advertising and other expenditures to the Secretary with their proposed budget of their anticipated expenses for each fiscal year period. See, 31 Fed. Reg. 5625 (7 C.F.R. §§ 916.31(c) and 917.35(f)). At that time, the Secretary may approve or disapprove of the "proposed" expenditures. The Secretary may adopt the proposed expenditures, he may reject portions of the recommended expenditures or he may reject all advertising and other expenditures for that year, just as he may do with any expenditure in the Committees' proposed budgets. Thus, it is Respondent's argument, that the Secretary through the approval process of proposed expenditures, as an ancillary matter, is simply approving the amounts for advertising and other expenditures, and that no separate determination need be made thereof.

The most obvious basis for the Secretary's "approvals," through the various harvest seasons, has been the Committees' recommendations, which, with a few minor exceptions, have been *pro forma* approved.

The Respondent maintains that the Secretary's approval process for the expenditures is made only after "examination of voluminous reports, proposals and budgets." However, an

examination of the data contained in Exhibit 297 reveals that for the most part the aforesaid referenced "voluminous" data consist of California summer fruit field staff bulletins; Minutes of promotional Subcommittee meetings, export Subcommittee meetings, economic Subcommittee meetings, research reports; and the proposed budgets submitted by the Committees. These documents are submitted to the Secretary with a view to approval of the Committees' requested budgets.

The Committees' recommended budgets contain not only amounts to be expended for "generic" advertising, but also amounts which are being remitted, through the California Tree Fruit Agreement, to the Tree Fruit Reserve for rents. The Exhibits, particularly Exhibit No. 297, do not contain a comprehensive statement or study indicating the effect that advertising activities have had on the sale of California summer fruits. Moreover, the fact that such data as Exhibit No. 297, is in existence does not *ipso facto* reflect that careful study and scrutiny were accorded thereto by those who had to make decisions as to the upcoming budget.

One searches in vain for factors against which the Secretary's discretion can be measured, such as data revealing the impact of advertising on profit. To what extent does "generic" advertising hurt or help brand names? Does the format utilized by the California Tree Fruit Agreement whereby only certain varieties are advertised result in a detriment to those who are not included in such advertising? By admission, advertising on the color chart does not benefit the smaller sellers because to get on the chart, one has to be among the 15 top sellers. What determinations were made as to whether or not the California Tree Fruit Agreement advertised proprietary varieties? One who holds a patent thereon or who "controls" a variety possesses a proprietary interest. To what extent is it desirable that the California Tree Fruit Agreement (through the approval process of

Mr. Parker) use assessments in determining what fruit are "promoted?" To what extent is it desirable, for example, through its advertising program, that the California Tree Fruit Agreement make decisions as to what varieties of fruit to "push," or advertise, together with the basic message that all California fruit are the same? This is not so. Mr. Gerawan, Mr. Kash and Mr. Elliott all believe their fruits are superior and should not be pulled down to mediocrity. By doing so, such persons/entities are deprived of additional profits which would be forthcoming from the sales of their superior products.

Without searching analysis and evaluation, how is the Secretary (or even growers and handlers) to know the extent to which "generic" advertising may reduce the profits of brand labels and the extent to which "generic" advertising may or may not benefit the industry. What degree of profitability is forthcoming from forced advertising? The evidence is devoid of any comprehensive research program which would answer these questions. Has there been a tracking of the fruit over a period of years and through good and bad economic cycles? What is the extent to which the level of advertising influences the "perceived value" of a product and how does this perception affect both the relative market share and the relative market price of the product? To what extent can one quantify the direct impact of different advertising strategies on profitability and growth? What is the average return on advertising investments? Is there a level at which additional advertising becomes nonprofitable.

Wileman/Kash's assessment monies ostensibly are used to pay "* * * such expenses as the Secretary may find are reasonable and are likely to be incurred by [the Commodity Committee] during any period specified by him * * *, for the maintenance and function of such authority and agency * * *." (7 U.S.C. § 610(b)(2)(ii)). The collection of assessments is also authorized for "* * * any form of marketing promotion including paid advertising * * *." (7 U.S.C. § 608c(6)(i)). The Secretary, when he approves the budgets of the various Committees, is signing what he determines to be expenses that are "reasonably and likely to be incurred" by the Committees. If they are not reasonable and are unnecessary for the functions of the Committees, they lack the validity which attaches to a proper approval process.

It is not the purpose of this decision to delineate the details which the Secretary may consider in his legislative capacity, but rather, to seek to ascertain what factors he did take into consideration and what details he omitted. It is beyond the scope of this hearing, and indeed would be inappropriate, to attempt to mandate the Secretary of Agriculture to hold a rulemaking proceeding with a view to amending the Orders with respect to any deficiencies which may exist. However, it is not beyond the scope of this adjudicatory proceeding to determine whether or not, when the Secretary approves the assessment amounts, he does so in a manner consonant with the Administrative Procedure Act and takes into consideration all of the various factors which should properly make up the assessment obligations.

The Petitioners seek not to have their views and contentions usurp those of the Secretary — it is his prerogative to make reasoned decision making. It is the Petitioners' view that he has not done that, but rather has contained a bureaucratic syndrome of approval of almost anything the Committees request. The evidence herein supports the Petitioners.

Basically, these are the concerns of the Petitioners — concerns which, fundamentally, the Respondent maintains are within the prerogative of the Committees and the California Tree Fruit Agreement to determine, and then send their determinations in to the Secretary, who, in the past, has rendered rather routine approval.

Would not "reasoned decision making" require a review of whether the forced "generic" advertising program has been of any benefit to the industry, i.e., has the advertising program increased the sales and profits of the growers and handlers? Also, the evidence is devoid of any attempt by the Secretary to consider alternatives to the Committee's recommendations, or to give reasoned explanations for rejecting alternatives.

Thus, it must be concluded that the Secretary has consistently failed, every season, to consider any alternative to the forced "generic" advertising program as imposed on the tree fruit industry by the California Tree Fruit Agreement and the Committees. The Secretary thus has abdicated his statutory duty, through *pro forma* bureaucratic action, of rubber stamping, for the most part, the California Tree Fruit Agreement's "generic" advertising and other expense recommendations, via the Committees. The Secretary not only failed to subject the Committees' and the California Tree Fruit Agreement's recommendations to the "deliberate thought" process as independent analysis required, but there was a failure of action to consider responsible alternatives and to give a reasoned explanation for rejection of such alternatives. There is an absence of evidence to support the determinations made by the Secretary other than self-servicing statements to the effect that everything in Exhibit No. 297 was reviewed.

The Respondent's argument falls by its own weight in this regard. On page 24 of its brief the Respondent states: "But the Petitioners have not shown what alternatives may have been before the Secretary at the formal hearing period as discussed above. The Secretary must base his decision exclusively on the record before him. However, Petitioners *never* cite to alternatives placed before the Secretary at *any* rulemaking proceeding." Therefore, Respondent would disregard Petitioners' challenges in this regard. However, formal rulemaking records did not make forced advertising mandatory nor did they determine the amount thereof.

The rulemaking records gave the Secretary the discretion to have an advertising program. or not to have an advertising program. Obviously, when one has discretionary authority, there is visualized a plethora or at least one or more alternatives available to him. Otherwise he wouldn't have any discretion. Surely, it was never intended by anyone, that the Secretary would have such discretion that he would simply rubber stamp any recommendations which came to him from the California Tree Fruit Agreement via the Committees, with respect to forced advertising. If anything, the hearing records giving the Secretary authority and discretion to have an advertising program, support the Petitioners. Even an elemental definition of discretion indicates that it is the power of free decision or latitude of choice within certain legal bounds. The Secretary's legal bounds are those of assuring that the provisions of the Act and the objectives of the Marketing Orders are carried out. This is not to say that the Secretary might not have arrived, over a ten-year period, at the very same decisions which he made. However, based on the stipulated responses, and other evidence, there is a lack of showing of independent scrutiny and analysis of the Committee's recommendations, and there is no way of knowing upon what factual basis the Secretary did, in fact, base his approvals. One can try in vain to give the Secretary benefit of doubt, namely, that he was aware of important matters affecting the industry and that his approval was a significant act.

Accordingly, the Respondent's argument that the requirement of reasoned consideration of forced advertising and whether to have it or not, was simply an alternative devise or thought conceivable by the mind of man and does not partake of significant and viable alternatives, is without merit. Certainly one cannot argue that the amount of these

assessments which are attributable to advertising and the amounts paid by the California Tree Fruit Agreement to the Tree Fruit Reserve are small amounts. Accordingly, the recitation by Respondent of *Farmers Union Central Exchange Inc. v. Federal Energy Regulatory Commission*, 734 F.2d 1486, 1511, n. 4 (D.C. Cir. 1984) is inapplicable as cited by the Respondent but it, indeed, is applicable to the extent that the court recognized that there is a duty to consider alternatives which are "significant and viable." Likewise, the argument of the Respondent that the Petitioners have not shown what alternatives may have been before the Secretary is likewise inappropriate. Obviously, and from a very elemental standpoint, the Secretary had alternatives such as mentioned above as to whether or not to have "generic" forced advertising, the extent of such "generic" forced advertising, the manner of any advertising program, and *the amount of funds to be attributable thereto*. Similar choices were available to him as to other expense amounts disbursed by the California Tree Fruit Agreement.

By ignoring practical realties and utilization of the bureaucratic system whereby interested persons do not have the opportunity to meaningfully voice their opinions to the United States Department of Agriculture decision-makers, not only have such persons been denied the right to participate in the decision-making process, but also, the Secretary has permitted the bureaucratic maze to attribute to him knowledge concerning such matters as: by admission of Mr. Kimbell, if certain matters were done differently by the California Tree Fruit Agreement, the assessments could be less; that the Tree Fruit Reserve was acting on a continuing basis as the alter ego of the California Tree Fruit Agreement, resulting in not only higher assessments, but also resulting in the achievement of acts which would be illegal were the Secretary to do them (such as lobbying and paying lawyers to defeat the Department's judicial process system). Without having to set forth the factors which went into his

determinations, one is left to guess as to what consideration was given to the aforesaid factors, if any.

The Respondent's argument that because the assessment rate is the result of a mathematical calculation, no lengthy comment period is necessary, begs the question. The question propounded by the Petitioners is what is included in those figures which make up this mathematically computation and why. Without the Secretary's statement as to why the assessment rates are higher than would be necessary, or why the advertising budget partakes of such a large amount of the assessments, as well as other relevant data surrounding the amounts making up the expenses of the Committees, one is without the facts by which to measure the legality of the Secretary's action as determined by standards, guidelines, and due process. Notwithstanding the assertions of the Respondent, there was no witness at either the *Wileman/Kash I* nor *Wileman/Kash II* hearing who testified that the determination of the Secretary of the advertising budget was based on review of thousands of documents provided from the field, such as is set forth in Exhibit 297. It well may be true that such documents were available but no witness indicated that he reviewed all of these documents and made certain judgmental determinations with respect thereto.

By attributing to the Secretary the knowledge and actions of his subordinates, including the Committeemen, the California Tree Fruit Agreement and, by inference, the Tree Fruit Reserve, the approval of the 1988-1989 expense budgets of the Committees was arbitrary and capricious. Absence such attribution, his approval of the 1988-1989 expense budgets was not reflective of reasoned decisionmaking and was unreasonable. In any event, the approval process was flawed and defective.

A review of the Secretary's assessment regulations from 1979 through 1989 establishes their retroactivity and, also, that, through the last decade, virtually the entire advertising

budget was expended well before the Secretary authorized any expenses to be incurred or assessments collected. (Ex. 7; A.B. 21-32; 33A; 33M). It is undisputed, and the evidence clearly shows, that a very substantial percentage of the tree fruit harvest each season was completed prior to the issuance of the assessment relation. In other words the fruit was picked and packed prior to the effective date of each year's assessment regulations.

First Amendment

Both parties recognize Petitioners' First Amendment claims to be a substantial issue in this case. In fact, the Respondent devoted approximately 23 pages of its brief thereto. The Respondent argues that the "forced speech" doctrine is inapplicable to commercial speech; that the promotional programs conducted under Marketing Orders 916 and 917 do not require the Petitioners to speak or engage in expressive conduct of any kind; that Petitioners' reliance on "union-shop" arrangements to support its forced association claim is meritless; that Petitioners' arguments are mere disagreement as to policy; and that Petitioners' First Amendment claims have been rejected in the case of *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989) *cert. denied.*, 58 U.S.L.W. 3513, Feb. 20, 1990.

For the Department of Agriculture, a declaration of unconstitutionality as to these assessments, would constitute an administrative dilemma and inconvenience where the Department would be forced to seek ways of redress. See the Judicial Officer's decision in *Saulsbury Orchards and Almond Processing, Inc., et al.*, AMA Docket No. F&V 981-4, January 23, 1991. However, the concern herein relates to the validity of Petitioners' contentions is if this were to be regarded as an issue calling for resolution herein. Although it is not necessary to reach this Constitutional assertion of Petitioners, a summary of their contentions is appropriate in the event they do not prevail on the other issues.

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law . . . abridging freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress for grievances."

Freedom of association is protected by the free speech clause of the First Amendment to the United States Constitution. While freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit, within the parameters of the principles, inclusion of freedom of speech, assembly and petition. *Healy v. James*, 408 U.S. 169, 181 (1972). This protection necessarily incorporates the right to be free from such association. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-634, 63 S.Ct. 1178, 1182-1183 (1943). A system which secures the right to proselytize religion, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *West Virginia State Board of Education, supra; Century Communications Corp. v. F.C.C.*, 835 F.2d 292 (D.C. Cir. 1987); *Pacific Gas and Electric v. P.U.C.*, 106 S.Ct. 903 (1986).

As stated above, the right of freedom of thought and association protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all. *West Virginia State Board of Education v. Barnette, supra*, at p. 633-634; *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831 (1974); *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977).

The Supreme Court has addressed the issue of forced speech coupled with forced association on a number of occasions. In *Railway Employees Department v. Hanson*, 351 U.S. 225, 76 S.Ct. 714 (1955), the employees argued that a union-shop agreement violated their right to freedom of association and freedom of thought protected by the First Amendment. The Court disagreed, and found no First Amendment violation or injury as the record contained no evidence that the compelled union dues were used for any purpose other than collective bargaining. However, the Court cautioned that "*if assessments are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented.*" (Emphasis added). *Hanson*, at p. 235.

Just such an issue was presented to the Supreme Court in *International Assn. of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784 (1961), where the Court considered another challenge to a union-shop agreement under the Railway Labor Act. In that case, there was evidence that the compelled union dues were being used for purposes of financing the campaigns of candidates for federal and state office and to promote political and economic doctrines, concepts and ideologies which the plaintiffs in that action opposed.

The Court avoided the Constitutional issues in that case by construing the Railway Labor Act as prohibiting the use of compulsory dues for political purposes. Although Justice Black and Justice Douglas, in concurring opinions, indicated that First Amendment violations existed.

The right of non-association under the freedom of speech provision of the First Amendment was squarely considered and recognized in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976). This case challenged the Sheriffs Office policy requiring all sheriffs employees be affiliated with the Democratic party. The Supreme Court determined that such a requirement would withstand judicial scrutiny as applied to

those employees in policy-making job classifications. However, it was violative of the individual employee's First Amendment non-association rights as to those employees who were not in policy-making positions. The court determined that the government's interest for effectiveness, efficiency and preservation of the party system could all be accomplished by "less restrictive means."

The Supreme Court ultimately was confronted with the issue which had not been previously decided previously: Whether compelled fees as a condition of employment could be used for political and ideological purposes unrelated to collective bargaining.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977), the Board entered into a contract with the Teachers' Union pursuant to which all teachers who failed to join the union were required to pay the union a service fee equal to the regular dues of members (an "agency-shop agreement"). A portion of those dues was used by the union to engage in a variety of activities and programs, encompassing economic, political, professional, scientific and religious points of view.

Plaintiffs, in *Abood, supra*, as members of the affected class opposed the use of said funds for anything "not germane to collective bargaining." *Hanson, supra*, at p. 235.

The Supreme Court agreed with the employees, and found no distinction between:

> "The fact that the appellants are compelled to make, rather than prohibited from making contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscious rather than coerced by the state." *Id.*, at pp. 234-235.

In upholding the position that the Supreme Court took in *Hanson, supra*, the Court explained that:

> "We do not hold that a union can not constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representatives. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by that threat of loss of government employment." *Ibid*, at pp. 235-236. (Footnote omitted).

The *Abood* case (*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which has been discussed herein before, was followed in the recent case of *Keller v. State Bar of California* (S. Ct. 1990) [58 L.W. 4661.] It was also followed in the case of *Gibson v. Florida Bar* (Ct. App. 11th Cir, No. 89-3388, July 23, 1990). The last case (*Gibson*) emphasized that the dissenter or the one providing the funds has the affirmative burden and obligation of raising an objection. But then, the Court went on to state: "The objector need not provide any further information concerning the motivation for his objection or his own position regarding the legislative policy and issue."

The central issue in the instant matter is whether the Constitutional limitations enunciated by the Supreme Court in *Abood, supra*, apply within the framework of the Agricultural Marketing Agreement Act and its Marketing Orders. Stated another way, the issue presently before this tribunal is: Whether Wileman/Kash, as a condition of their being handlers of tree fruit, may be forced to expend their money, deemed by the Respondent to foster the legitimate purposes of the Agricultural Marketing Agreement Act, but which expenditures do not improve their business position, but

rather are used to finance an advertising program which is contrary to their personal, professional, ideologic, philosophical and commercial beliefs. The Respondent's position that the assessments are used to foster the legitimate purposes of the Agricultural Marketing Agreement Act is contested. Respondent dismisses the use of assessment money by the Tree Fruit Reserve as irrelevant, but the Tree Fruit Reserve was the California Tree Fruit Agreement's *alter ego* and so its expenditures must be considered in evaluating the merits of Petitioners' arguments.

The Respondent admits that there are thirty-three States in this Nation which handle Peaches, twenty-six States which handle Plums and twenty-eight States which handle Nectarines. *However, California is the only State of forced assessments to pay for "generic" advertising for these three tree fruit commodities.* As noted above, the Petitioners have raised the issue of whether such assessments are in the nature of taxes.

There are those who benefit from the forced "generic" advertising assessments, but they are not the Petitioners nor many other tree fruit handlers who are forced to subsidize such "generic" advertising. There has been no showing that the expenditure of forced assessment funds are of benefit to many of those who pay them. There are many others who participate and profit from the tree fruit industry, in addition to the competitors of Petitioners. Those individuals and entities, both nationwide and internationally, who grow Peaches, Plums and Nectarines, market them, transport them, retail them, and those who otherwise profit from Petitioners' packing operations, benefit therefrom but they do not contribute financially to the promotion and advertising programs. This is equally applicable to the retailers who traditionally are the entities who receive the lion's share of the profits from the tree fruit industry. (Tr. 2953-2954).

It has not been shown through evidentiary data that the United States Department of Agriculture's interest in promoting Peaches, Plum and Nectarines industries, is accomplished by assessing California handlers, *as a selective portion of the industry*. The evidence does establish that there is not an equal involvement of the entire industry. Growers and handlers in other States which grow Peaches, Plums and Nectarines are allowed to receive a "free ride" and benefit from the "generic" advertising conducted by California Tree Fruit Agreement. This is equally true of fruit derived from foreign markets. Several foreign nations provide Peaches, Plums and Nectarines to the American consumer. The influx of such similar tree fruit commodities from these foreign markets directly competes with the California Tree Fruit industry. Although competing in the same market for the same customers, no restrictions nor mandatory contribution to a "generic" advertising program are imposed on the import market.

It is not believed necessary to address the contention of the Petitioners that they should be allowed a credit towards their "generic" advertising assessment obligations for direct expenditures when they directly advertise their specific brand name. This would be a matter for rulemaking. As indicated by Respondent: "Congress delegated authority to the Secretary of Agriculture to further determine on the basis of formal rulemaking hearings whether the promotional programs would effectuate the declared policy of the Act as it pertains to peaches, plums and nectarines." It will be noted herein that with respect to the implementation of the "advertising" programs under the Orders here in question, there is scant evidence in the formal rulemaking records, other than general statements and opinions with respect to the need therefor, as to what limitations should be imposed thereon, what specific objectives are to be obtained, how the advertising program are to be evaluated, etc. Certainly, the rulemaking records contain generalized statements. In order for the record to be complete it will be noted that the Petitioners' arguments in this regard, briefly summarized, relate, among other things, to the contention that there is nothing in the Agricultural Marketing Agreement Act nor the legislative history of the Agricultural Marketing Agreement Act expressing why handlers of certain commodities are allowed a set off from their assessment obligations when they advertise their own brand label. (Pub. L. No. 92-210, 85 Stat. 340).

The Petitioners, however, do point out that 7 C.F.R. section 981.41 is the "research and development" regulation applicable to the almond industry. Such regulation allows for "crediting the *pro rata* expense assessment obligation of each handler with such portion of his direct expenditure for such marketing promotion including paid advertising * * *." At the time Congress was considering an amendment to the Agricultural Marketing Agreement Act to require forced "generic" advertising for all handlers within the almond industry, the Secretary was, at the same time, requesting that Congress authorize credits to be applied to offset the assessment obligation imposed:

> The proposed amendment would encourage handlers to maintain or develop their own promotions by crediting a handler's assessment obligation with such of his direct expenditures as are authorized in the marketing order. S. Rep. No. 91-1204, 91st Cong., 2d Sess. (September 17, 1970).

The history of this amendment does not state the reason why it was decided that handlers of almonds should be allowed a credit towards the imposition of "generic" advertising assessments when they advertise their own specific brand. This is also true with respect to raisins which were added to 7 U.S.C. section 608(6)(I), with no legislative explanation whatsoever. (Pub. L. No. 95-279, 92 Stat. 242 (May 15, 1978)).

Filberts (Hazel nuts) were added to 7 U.S.C. 608(6)(I) in 1983. Filberts are grown for the most part only in Oregon and Washington. With respect to authorizing credits against the handlers forced "generic" advertising assessment obligations, it is indicated that such credits "would stimulate filbert handlers to promote their own brands and to develop their own promotional programs in concert with the overall marketing strategy." (Pub. L. 98-171, 97 Stat. 117 (1983)).

It is believed that California is the nation's leading producing state of olives and walnuts. The legislative history also states that walnuts and olives are a rapidly growing industry and advertising is necessary in order to educate the consumer as to the various uses of the product and *pro rata* assessment credits are to be encouraged so that handlers will advertise their own product.

The Petitioners contend that the situations described above, with respect to commodities which are allowed credits towards "generic" advertising assessment obligations, when a handler advertises his own specific brand, are not distinguishable from California grown Peaches, Plums and Nectarines. In fact, they are virtually identical. These commodities are grown primarily on the West Coast. California, with respect to Peaches, Plums, Nectarines, walnuts, olives, raisins and almonds; Oregon and Washington for filberts. Thus, Petitioners maintain that there is no "rational basis" nor compelling governmental interest as to why some commodities are allowed credits while others similarly situated are not. These contentions of Petitioners relate more clearly to their Constitutional arguments

Petitioners do not want to be forced into associating with, nor to be forcibly required to promote their competitors' fruit. (Tr. 1767). Respondent does not address, but it did not dispute, that during the course of the instant hearing, it was established that "generic" advertising assessments are being imposed which promote the proprietary variety of one

of the Committeemen. In a previous 7 U.S.C. § 608c(15)(A) Petition hearing brought by another handler, Jonathan Field, Manager of the California Tree Fruit Agreement, testified that the "generic" advertising assessments levied were expended solely on "generic" advertising. He stated that no specific proprietary variety of any grower/handler was promoted through the California Tree Fruit Agreement "generic" advertising program. (Ex. No. 258). Yet, one week after Jonathan Field testified in that matter, the 1989 California Tree Fruit Agreement Promotional Chart was distributed throughout the nation. That chart included the promotion of the "Red Jim" Nectarine, an exclusive proprietary variety of one of the commodity Committeemen. (Ex. No. 256).

As one of Petitioners' witnesses, Mr. Ray Gerawan, testified, the Red Jim Nectarine directly competes with his varieties. Mr. Gerawan explained that the Red Jim Nectarine is perhaps one of the most popular varieties sold. For Mr. Gerawan to compete directly with the Red Jim Nectarine, he must expend additional money and effort to promote his own "Prima Red" variety. Yet, while he expends his own money to compete with the Red Jim, the California Tree Fruit Agreement is, at the same time, expending his "generic" advertising assessments to promote his competitor's variety. (Tr. 1767).

Mr. Gerawan complimented Mr. Jimmy Ito on his successful promotion of the Red Jim Nectarine. Mr. Gerawan pointed out that there have been times when the Red Jim Nectarine might bring as much as $12.00 a box, while at the same time, Mr. Gerawan's "Prima Red" varieties might only bring $5.00 a box. He attributes this to brand label recognition and effective individual promotion. (Tr. 1902). As a result, Mr. Gerawan was forced to expend large sums of money, in thinning and pruning, to bring on more color, to compete with Mr. Ito's Red Jim.

This, Mr. Gerawan explains, is as it should be. "That's free enterprise. That's how people become successful. You have to get out of the area of mediocrity." (Tr. 1876). However, Mr. Gerawan does not want his $660,000.00 in the California Tree Fruit Agreement assessments to be used by the California Tree Fruit Agreement to directly promote his competitor's fruit.

It is Wileman/Kash's contention that they do not surrender their First Amendment rights of free speech and association by becoming members of the tree fruit industry. They did not *voluntarily* become subject to the Nectarine, Plum and Peach Marketing Orders. Those Orders regulate every handler of tree fruit in California. Thus, all handlers are compelled to be regulated by the Federal government. Money is being taken from Wileman/Kash to be used for an advertising program which they ideologically, philosophically, economically and commercially find unacceptable.

The thrust of Wileman/Kash's position is that it is wrong to be required to finance, and be forced to associate with, an advertising program which is not structured for their benefit. (Tr. 3901). It is incongruous for Respondent to maintain that "generic" advertising helps Petitioners! Petitioners are businessmen and know the best use of their funds. It helps, among others, their competition. Testimony was elicited, and adopted by each Petitioner, which, in essence, summarizes their contentions that the California Tree Fruit Agreement "generic" advertising program:

> "... is not helping me and I don't want my dollars being spent for me by a committee or any body else. I will spend my own dollars on what I created and what I produce... It is proven that free enterprise and private industry is the essence of this whole thing.
>
> ... I am interested in advertising ... my label. I'm not interested in putting any money in anybody else's advertising program. I have the right as a grower to grow what I wish to grow.
>
> I don't care what CTFA does with their money. I just don't want any of my money in it. I just don't want any of my money used. Whether it is effective for them or not is of no concern ... if growers want to form their own co-ops and they want to be competitive ... then God bless them, go for it ... It is not a question whether CTFA is effective or not effective or anybody else. They are not effective for me, they are a hindrance to me. I'm not here to judge what they do for somebody else." (Tr. 1835-1836).

The terms of 7 C.F.R. §§ 916.45 and 917.39 make it clear that Wileman/Kash are required to contribute financially to the support of the tree fruit industry. But Wileman/Kash's forced association goes further than mere monetary support. The Agricultural Marketing Agreement Act, the Secretary's Marketing Orders and accompanying regulations purport to require Wileman/Kash, as tree fruit handlers, to maintain various types of books and records, and to prepare and make regular detailed reports to the California Tree Fruit Agreement. (7 C.F.R. §§ 916.60 and 917.50). In short, the scope of Wileman/Kash's forced association goes beyond mere compulsory financial contributions. They are also required to take an active part in administrative procedures which ultimately further the Committees' existence and programs. The added aspects of association may be significant in the analysis of this issue. Some older cases appear to suggest that, if the only compulsory aspect of association is the payment of money, no true forced association results but that forced association arises when there is further compelled action.

Wileman/Kash acknowledge the realization that their Constitutional rights of free speech and association are not absolute. *Roberts v. United States Jay-Cees*, 468 U.S. 609, 104 S.Ct. 3244 (1984); *United States Civil Service Commis-*

sion v. National Assn. of Letter Carriers, 413 U.S. 458, 93 S.Ct. 2880 (1973). Even protected First Amendment rights may be impinged upon "if the state demonstrates a sufficiently important interest." *Buckley v. Valleo*, 424 U.S. 1, 96 S.Ct. 612 (1976). But *to justify such a constitutional intrusion the government must demonstrate a "compelling" interest. Cousins v. Wigoda*, 419 U.S. 477, 95 S.Ct. 54 (1975); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

Wileman/Kash do not deny that the government may have a compelling interest in regulating the quality of fruit that is disseminated to the American public. Although the mere existence of the Agricultural Marketing Agreement Act constitutes a significant impingement upon the First Amendment rights of handlers, that impingement can be argued to be amply justified by a compelling governmental interest in the regulation of the tree fruit industry to establish and maintain orderly marketing conditions and to insure that minimum standards of quality and maturity are complied with. (Tr. 3879).

Wileman/Kash accept the fact that First Amendment intrusions on their rights are inevitable as a result of the compelled association with the California Tree Fruit Agreement through the enforcement of the Marketing Orders. (See: *Ellis v. Railway Clerks*, 466 U.S. 435, 456, 104 S.Ct. 1883 (1984)). Wileman/Kash question, however, what possible "compelling governmental interest" can be asserted that could justify the impingement of their First Amendment protections by forced subsidization of a tree fruit "generic" advertising program?

Infringement on their right to associate or their right not to associate:

> "May be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less

> restrictive of associational freedoms. (Citation omitted) [Thus even when pursuing a legitimate governmental interest, the means chosen] . . . must be 'least restrictive of freedom and belief and association' (Citation omitted)." *Chicago Teachers Union v. Hudson*, 106 S.Ct. 1066 (1986).

When the activity of any of the various Committees is "clearly germane" to either its regulatory or administrative functions and that activity does not involve ideological, philosophical, commercial or economic causes, no Constitutional barrier prohibits it. "At a minimum, the Union may constitutionally expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining" *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

Thus, for example, when the Committees expend funds for the purpose of inspection services or to organize public meetings, no First Amendment restrictions preclude those expenditures. However, the Committees may not constitutionally use compelled assessments for the support of a "generic" advertising program which is not germane to its statutory purpose.

To the argument the United States Department of Agriculture asserts, that no First Amendment issues have been raised, because there can be no coercion when someone advertises a product he is in the business of selling, is to say that the government can actively be involved in determining what Wileman/Kash's views should or should not be:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by work or act their faith therein." [citations]. *Abood, supra*, at p. 235.

It is certainly not for the Secretary of Agriculture to determine what Wileman/Kash believe to be a good way to spend their money in speaking to the public about their products (amounting to approximately Two Hundred Dollars ($200.00) an acre), nor is it appropriate for the Secretary to contend that Wileman/Kash should not object to their money being expended to generically advertise a commodity that they are in the business of selling:

> "It is our conclusion that the right to remain silent in the face of an illegitimate demand for speech is as much a part of First Amendment protection as the right to speak out in the face of illegitimate demands for silence.
>
> "To compel a person to speak what is not in his mind offends the very principals of tolerance and understanding which has so long been the foundation of our great land." *Russo v. Central School District*, 469 F.2d 623 (2nd Cir. 1972).

The Supreme Court has made it quite clear that a person, be it an individual or corporation, must not be forced to speak or forced to adhere to views which that person finds objectionable, even when the forced speech arguably advances the public good or First Amendment values.

The last case in a line of First Amendment cases emanating from the United States Supreme Court was recently issued. *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990), supports Petitioners' position that they may not be forced to associate with, or financially support, the California Tree Fruit Agreement "generic" advertising program.

In *Keller, supra*, members of the State Bar of California argued that their annual State Bar membership dues were inappropriately channeled to finance ideological and political activities to which they were opposed. A portion of the State Bar membership dues were being diverted to endorse or advance gun control legislation, nuclear weapons freeze

initiatives, etc. The Supreme Court, in supporting the position taken by the dissident State Bar members, stated:

> "It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the Courts should be called upon to pay their fair share of the costs of the professional involvement in this effort . . . precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum, Petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with the disciplining members of the Bar or proposing ethical codes for the profession."

Respondent continues to argue that Wileman/Kash have not been prevented from speaking. They may advertise their fruit as they so desire. However, the Supreme Court in *Keller, supra*, found this contention to lack merit.

Wileman/Kash's advertising budget is severely restricted when in excess of One Hundred Thousand Dollars ($100,000.00) is extracted by the California Tree Fruit Agreement through its forced "generic" advertising program. (The same is true as to Mr. Gerawan's $600,000). The regulations unquestionably place an "economically chillling effect" on Wileman/Kash's ability to speak as they prefer.

Respondent argues that being forced to associate and contribute to the advancement of ideological and philosophical speech to which Wileman/Kash disagree has "no basis in law or fact." Respondent then attempts to distinguish the cases cited by Petitioners which support Wileman/Kash's right to freedom from forced associational speech and financial support of issues and associations which they find abhorrent.

Mr. Rodney Chang, President of Kash, Inc., testified regarding his moral objections to one particular television advertisement run by the California Tree Fruit Agreement during the 1986 through 1988 harvest seasons. Exhibit No. 301(B) was found, by Mr. Chang to be morally reprehensible. Exhibit No. 301(B) depicts several still photographs which were scenes from the television commercial run during the harvest season. Mr. Chang found objectionable the scenes depicting a young girl in a wet bathing suit running through a sprinkler, while at the same time the announcer is stating "remember the taste . . . so cool, juicy . . . taste them and see." (Ex. No. 301(B)).

Mr. Chang feels uncomfortable that Kash, Inc.'s assessment monies are being used to promote a sexually subliminal message (Tr. 2966) involving a young child. He finds it impossible to understand what possible interest the Federal government has in promoting Peach, Plum and Nectarine consumption, particularly by using children in such advertising. (Tr. 2966).

Respondent ignores the damages that have been sustained as a result of this forced association. Respondent argues that the mandatory assessments collected are not used for any purpose other than the promotion of California fruit. This is not the issue, but even if it were, assessment monies are used for such advertising, which benefits growers of fruit in other States who pay no such assessments. The injury sought to be avoided is undue governmental control in

dictating an individual's natural right to choose his own way of life without any compelling interest having been demonstrated therefor. Clearly, coerced participation injures Wileman/Kash, both by forcibly taking from them their time, money and reputation, and then using their money to support views which they oppose. The cases cited, *supra*, by Wileman/Kash recognize that, absent a compelling governmental interest, individuals may not be coerced into rendering direct financial support to private associations. *Abood v. Detroit Board of Education, supra; Keller, supra.*

An analysis of the cases cited by Respondent fails to recognize the differing circumstances and facts giving rise to Wileman/Kash's forced association Constitutional arguments. For example, Respondent cites *Railway Employees Department American Federation of Labor v. Hansen, supra*, for the proposition that mandatory assessment programs do not violate the protections afforded by the First Amendment. However, *Hansen, supra*, dealt only with fees collected for purposes relative to collective bargaining issues.

Respondent fails to note that the *Hansen* Court recognized that the compelled payment of money for purposes other than collective bargaining would raise First Amendment questions, and cautioned that "if assessment are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented," *Hansen, supra*, at p. 235. It should be further noted that both Justice Douglas and Justice Black found First Amendment violations through the compelled payment of assessments by those opposed to the manner in which the union promoted its economic goals. (See: *Railway Employees v. Hansen, supra*).

Respondent also relies heavily on *Ellis v. Brotherhood of Railway Clerks, supra*, which it argues is supportive of Respondent's position that mandatory assessments for pur-

poses of "generic" advertising are not violative of Wileman/Kash's First Amendment rights of non-association. A review of *Ellis, supra*, does not support Respondent's position. The Supreme Court, in *Ellis, supra*, did not consider the First Amendment Constitutional issues, but rather developed what it deemed to be a proper remedy for the rebate of monies previously extracted by the union to support ideological speech which the union members opposed. There was no question that the union had violated the members' First Amendment rights, that issue was clear. The issue raised in *Ellis, supra*, was whether or not the union had the right to collect mandatory assessments for all members of the union, and then repay, at a later date, those individuals who objected to the use of their assessments expended for improper purposes. The Court ruled that the exaction of assessments. even temporarily, from those opposed to the ideological message to which those assessments were to be used to foster, was improper. Clearly, *Ellis, supra*, is not supportive of Respondent's position in the instant matter.

In a relatively recent case, the Third Circuit Court of Appeals analyzed the leading First Amendment forced association cases, cited by both Wileman/Kash and Respondent, in deciding yet another First Amendment forced association claim. *Galda v. Rutgers*, 772 F.2d 1660 (3d Cir. 1985), dealt with challenges by state university students who were required by school policy to fund an organization that promoted ideological philosophies which the students opposed and declined to support. The Court, in analyzing the leading precedents with respect to this issue, reasoned:

> "In short what *Abood* holds objectionable is the 'compulsory subsidization of ideological activities' by those who object to it, 431 U.S. at 237, 97 S. Ct. at 1800. Commentators have debated the basis supporting this right. It may be a broad concept of 'individual freedom of mind,' *Wooley v. Maynard*, 430 U.S. at 714, 97 S. Ct. at 1435, or

> a ban on coerced affirmation of distasteful views, or a right not to be subjected to a limitation on freedom of conscience, or perhaps a right to maintain silence in the face of a government pronouncement. We resist the temptation to expound on these absorbing theories because whatever the source or underlying rational, the Supreme Court's precedents established to our satisfaction that plaintiffs have presented a valid constitutional interest for consideration." *Id.* at p. 1064.

The Court went on to conclude:

> "A state may not choose means that unnecessarily restrict constitutionally protected liberty, if there is open a less drastic way of satisfying its legitimate interest. Nor may the state choose a legislative scheme that broadly stifles the exercise of fundamental liberties. [Citations]. The compelling state interest in eliminating 'free-riders' in the interest of preserving labor peace in the union dues context [citation], does not exist in the circumstances here. The university has presented no evidence, nor do we believe it could, that the educational experience which it cites as justification could not be gained by other means which do not trench on the Plaintiffs' constitutional rights." *Id.* at pp. 1066-1067.

Many of these same arguments are present in the instant matter. Wileman/Kash are forced to provide money which is used to project a message, not to foster legitimate purposes of the Agricultural Marketing Agreement Act, nor to improve their business position, but rather to finance an advertising program which is contrary to their personal, professional, ideological, philosophical and commercial beliefs. Wileman/Kash do not deny that the imposition of mandatory assessments that are "clearly germane" to the industry's regulatory or administrative functions are properly collectible. These involve such functions as inspection fees, salaries, and administration of the Orders. However, in-

fringement on their right to associate, or more importantly, their right not to associate, can only be justified:

> "... by regulations adopted to serve *compelling state interests*, unrelated to the suppression of ideas, that can be achieved through means significantly less restrictive of associational freedoms. [Citation]. [Thus, even when pursuing a legitimate governmental interest, the means]... must be 'least restrictive of freedom and belief and association.' [Citation omitted]." *Chicago Teachers Union v. Hudson, supra*, at p. 1074, fn. 11.

Respondent fails to convincingly persuade that there is any "compelling governmental interest" that justifies the impingement of Wileman/Kash's First Amendment protections through forced subsidization of a tree fruit "generic" advertising program. It is not enough to make a statement that there is a compelling governmental interest, the intrusion on Petitioners' rights must be justified by proof, particularly one that is not "narrowly tailored" to satisfy a compelling governmental interest which seeks a "fit" which is the least burdensome on Wileman/Kash's constitutionally protected First Amendment rights. (*Board of Trustees Of The State University Of New York v. Fox*, 109 S.Ct. 3028 (1989)).

Respondent bears the burden of justifying a "compelling state interest" sufficient to impact Wileman/Kash's constitutionally protected rights. The facts in this case do not reveal that such a burden has been met. That failure of burden was not met when the State of North Carolina wished to protect charitable organizations from the possibility of fraud [*Riley v. National Federation Of The Blind Of North Carolina, supra*]; when the Public Utilities Commission Of California wished to provide the public with alternative viewpoints [*Pacific Gas & Electric Co. v. P.U.C. of California*]; 106 S.Ct. 903 (1986) when the Federal Communications Commission wished to protect local television programming

[*Century Communications Corp. v. Federal Communication Commission, supra*]; 835 F.2d 292 (D.C. Cir. 1987) or when an anti-American protester publicly burns the American flag [*Texas v. Johnson*, 89 D.A.R. 8029 (1989)].

Even if Respondent were able to satisfy its burden to justify a "compelling governmental interest," which Respondent has not done, the tremendous infringement upon Wileman/Kash's First Amendment rights cannot be circumvented. As must be noted, *Respondent did not attempt to argue that the forced "generic" advertising program imposed on Wileman/Kash had been drafted in such a way that the infringement on their Constitutional rights is no more than necessary to achieve the stated goal.*

Respondent cannot succeed by arguing that forcing California handlers to subsidize a "generic" advertising program has been "narrowly tailored" so that it might "fit" between the legislative ends to be achieved and the means chosen to accomplish those ends. *Board of Trustees Of The State University Of New York v. Fox, supra.* Such statements are not reflective of a "compelling governmental interest."

It is Wileman/Kash's position that the assessments for all programs of the California Tree Fruit Agreement not directly related to compliance and inspection costs are unlawful. Specifically, Wileman/Kash contend that assessments collected to support programs which are used for forced "generic" advertising, to fund the administrative costs of a non-existent entity (the California Tree Fruit Agreement), promotion and research projects for the purpose of regulating out smaller sizes or designed for the purpose of buttressing the Committees' intentions to raise maturity standards, are not collectible as they are violative of Wileman/Kash's First Amendment rights. Except for the First Amendment issue, these contentions of Petitioners have been considered herein only to the extent they relate to the statutory grounds for relief.

Purely commercial speech is protected by the First Amendment of the United States Constitution. *Virginia Pharmacy Board v. Virginia Citizen's Consumer Counsel*, 425 U.S. 748, 96 S.Ct. 1817 (1976); *Zauderer v. Office of Disciplinary Council*, 105 S.Ct. 2265 (1985); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912 (1978). The fact that Wileman/Kash are corporations does not detract from Constitutional protection. *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 100 S.Ct. 2326 (1980). The fact that Wileman/Kash are in a heavily governmental regulated monopoly does not preclude their assertion of First Amendment rights. *Consolidated Edison*, *supra*, at p. 530 fn. 1.

Since there is certainty of appeal of the present case to the Federal Courts, it is noted that were the Court unable to find that forced "generic" advertising, as authorized by the Marketing Orders, amounts to a violation of freedom of speech and association, the Court must still determine whether "generic" advertising assessments violate Wileman/Kash's Constitutionally protected commercial speech. Commercial speech is defined as "expression related solely to the economic interest of the speaker and his audience." *Virginia Pharmacy Board v. Virginia Citizen's Consumer Counsel*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-364, 97 S.Ct. 2691, 2698-2699 (1977); *Friedman v, Rogers*, 440 U.S. 1, 11, 99 S.Ct. 887 (1979).

In 1980, the Supreme Court issued an opinion which has become the standard by which virtually all commercial speech cases are evaluated. *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2848 (1980), involved a challenge to the Constitutionality of a regulation which banned promotional advertising by an electrical utility corporation. The Supreme Court in ruling that the regulation was unconstitutionally violative of the

First Amendment, set forth a four part test to be used in determining whether governmental regulation of commercial speech constitutes a violation of First Amendment protections:

> "For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, or whether it is not more extensive than is necessary to serve that interest." *Id.*, at p. 566.

In applying the four (4) part analysis of *Central Hudson*, *supra*, to the issues involved in the instant matter, the Secretary cannot support his position justifying the forced imposition of "generic" advertising assessments. The Secretary does not contend that the expression at issue is either unlawful or related to unlawful activity. Therefore, the first element of the *Central Hudson*, *supra*, test is not at issue.

Secondly, a determination must be made as to whether the United States Department of Agriculture's interest is substantial. The United States Department of Agriculture contends that the government's interest in forced "generic" advertising lies in promoting the growth of the Plum, Nectarine and Peach industries. Wileman/Kash fail to discern what comprises the basis for a governmental interest in the promotion of an industry in the private sector. Supposedly, it is to promote consumer awareness and interest in the California tree fruit industry. This program, in turn, competes with other Marketing Order's promotional programs. Wileman/Kash derive no benefit from the "generic" advertising program. Further, Wileman/Kash are required to expend in excess of One Hundred Thousand Dollars ($100,000.00) a year to generically promote the sale of Nectarines, Plums and Peaches. They have no interest in

expending vast sums of money in the promotion of fruit for the benefit of their competitors. Particularly, when this same One Hundred Thousand Dollars ($100,000.00) could easily support an advertising program directed at promoting their own brand name. (Tr. 3895, 4191).

Throughout the years, Wileman/Kash have developed cultural practices which have enabled them to develop and harvest an extremely high quality fruit. Fruit that they consider substantially superior to that grown by the majority of their competitors. They have invested substantial time and vast sums of money in developing these cultural practices. By being forced to promote a "generic" advertising program their ability to promote their own labels is substantially curtailed. (Tr. 4141). Further, their ability to continue research to improve their products is substantially impaired by being required to fund the California Tree Fruit Agreement's "generic" program.

Promotion, through the California Tree Fruit Agreement's "generic" advertising program, advances the notion that all California fruit is the same and promotes the slogan that "red is better," which is not necessarily correct as revealed by the evidence herein. That is what is projected by the commercials advertising California fruit. Virtually every witness testified that different varieties of the same commodity have different tastes. Further, the same variety grown on different parcels of land will have differences in taste, color, size, different amounts of soluble solids, etc. (Tr. 4596-4597; 2961-2963). Thus, to lump all California tree fruit into a single category is misleading and Wileman/Kash have stressed their philosophical objections of their advertising assessments being directed to such a message. (Tr. 2960). The Respondent has not adduced any evidence to show why the United States Department of Agriculture would have a legitimate purpose in having the

consumer believe that all California fruit are the same, when they are not.

If, as a result of the "generic" advertising assessments being imposed, Wileman/Kash are unable to promote their fruit through their own specific brand name advertising, their competitive advantage is lost. In fact, there would be no incentive for them to continue advancing their cultural practices when their fruit would, from a consumer's standpoint, be no different from that in the mainstream. (Tr. 2960).

Although the Respondent has maintained that "generic" advertising is beneficial to all handlers, there is no record evidence to show that it is more than a general statement. To the contrary, Petitioners, as well as some of their witnesses, have shown that such generic" advertising is not beneficial to them.

If, as stated above, the "substantial interest" necessary for the government to involve itself in a tree fruit "generic" advertising program is to help promote the industry, why does it not encompass all handlers? For example, Peaches are grown in the majority of the states. However, only three states have Marketing Orders which regulate production: Georgia; Colorado; and, California. Only one Marketing Order requires the forced payment of assessments to promote a "generic" advertising program — California. What valid "substantial governmental interest" is promoted by requiring the California Peach to be generically advertised while no such promotional program has been established for the Georgia Peach?

Assuming arguendo, that the Secretary can establish a "substantial governmental interest" sufficient to justify the forced imposition of "generic" advertising assessments on the tree fruit industry, the Court must then proceed to the third prong of the *Central Hudson* test. Has the requirement

of forced "generic" advertising assessments directly advanced the government's substantial interest?

Respondent argues that the government's substantial interest has been set forth in the rulemaking record, located at Exhibit Nos. 31, 32 and 33. Respondent has failed to reference any particular entry in the rulemaking record which substantiates this position and apparently, it does not exist.

There have never been any research projects conducted which establish that forced "generic" advertising has benefitted the tree fruit industry particularly to the extent of the assessments collected therefrom. There is lacking evidence incorporated in the Secretary's rulemaking record which indicates that California tree fruit sales (or profits to the growers and handlers) have increased as a result of the forced "generic" advertising program. As Wileman/Kash testified, such a program has certainly not benefitted their sales' efforts. In fact, the "generic" advertising program does not even reach the people which Wileman/Kash would hope that advertising might influence. As Petitioner Elliott testified, his operation deals solely with the terminal markets where brand label recognition is extremely important. Mr. Elliott stated that promoting his label is vital. As an example, he points out that nobody is aware of "Dan Drackett." However, everyone is aware of the product that he created — "Draino". (Tr. 3895). The logo "Eat California Fruit" which Wileman/Kash are forced to promote provides no benefit whatsoever in the selling of their fruit on the terminal market. "Mr. Sunshine" and "Kash, Inc." brand names are what sell their fruit. (Tr. 3897-3898).

Wileman/Kash can find no nexus between the interest asserted to promote the asserted governmental ends, and the means employed. They point out that it is difficult to envision, based on the type of advertising program conducted by the California Tree Fruit Agreement, any substantial benefit derived by the growers and handlers. The California Tree Fruit Agreement prints up some colorful posters displaying fruit. (Ex. Nos. 256 and 298). It's effectiveness as an advertisement program has not been shown. The California Tree Fruit Agreement also runs radio spots at odd hours of the day to advertise fruit. For example, radio spots at 5:00 a.m., with little jingles that say "Eat California Summer Fruit." (Ex. Nos. 301 and 302). Although a catchy tune, it hardly entices a consumer to jump out of bed (assuming the average consumer is awake at 5:00 a.m.) and run down to the store to buy California fruit. For this, Wileman/Kash pay to the California Tree Fruit Agreement in excess of One Hundred Thousand Dollars ($100,000.00) in forced "generic" advertising assessments.

Whatever "substantial Governmental interest" the Secretary has in maintaining a "generic" tree fruit advertising program for the State of California certainly is not directly advanced by the forced imposition of "generic" advertising assessments. As was made clear by the Supreme Court in *Central Hudson, supra*, the Courts refuse to uphold regulations that negatively impact an individual's and/or corporation's Constitutional rights of free speech and association when such regulations, at best, only indirectly advance the "governmental interest" involved.

The fourth and final element which must necessarily be evaluated prior to the upholding of a regulation which would restrict personal liberties, requires a determination be made as to whether said regulation is more extensive than necessary to serve the purported "governmental interest." The issue involved, as it relates to Wileman/Kash, is whether the forced imposition of advertising assessments for the purposes of "generic" advertising is more extensive than necessary to further the United States Department of Agriculture's interest in promoting the tree fruit industry and/or the orderly marketing of tree fruit.

To use a regulation "not more extensive than is necessary to serve that interest," *Central Hudson, supra*, does not require the government to employ the "most restrictive means," however, it *must* "further a legitimate governmental goal." That government goal must be substantial and the cost carefully calculated. *Board of Trustees of the State University of New York v. Fox, supra*. Should it be deemed not to be germane to the purpose of regulating the industry or improving the quality of the service, then those from whom the assessments are derived, need notice in advance of what the Secretary is doing with their money and then allow them to withhold those amounts that are utilized for other purposes, not constituting a compelling governmental interest.

In exercising its purported "substantial governmental interest," the United States Department of Agriculture is forcing Wileman/Kash to speak in a manner which they find objectionable (i.e., paying money to advertise their competitors' products). The Supreme Court has consistently taken the position that the choice to speak, for corporations, as well as for individuals, includes within it the choice of what not to say. "Speech does not lose its protection because of the corporate identity of the speaker." *Pacific Gas & Electric Co. v. P.U.C. of California*, 106 S.Ct. 903 (1986) *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407 (1978)):

> "Were the government freely able to compel corporate speakers to propound . . . messages with which they disagree, this protection would be empty, as the government could require speakers to affirm in one breath that which they deny in the next . . . the danger that appellant would be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our decisions in *Bellotti* and *Consolidated Edison* . . . it is a danger that the government may not impose absent a compelling interest." *Pacific Gas & Electric, supra*, at p. 912.

The United States Department of Agriculture has previously taken the position that Wileman/Kash are not being prevented from speaking because Wileman/Kash can advertise their fruit if they so desire. However, this contention is clearly erroneous. Wileman/Kash's advertising budget is severely restricted when assessments amounting to approximately One Hundred Ninety Thousand Dollars ($190,000,00) are extracted by the California Tree Fruit Agreement by way of forced "generic" advertising assessments. (Tr. 4147).

The regulation unquestionably places an "economically chilling affect" on Wileman/Kash's ability to speak as they would prefer. As they pack what they consider to be a superior grade of fruit than that of their competition (Tr. 2956), it is their desire to educate the consumer as to their existence and to let their high quality fruit work to promote their own labels. Therefore, with what is left of their advertising budget (after paving the California Tree Fruit Agreement forced "generic" advertising assessments) Wileman/Kash advertise their own labels. (Tr. 4141). They would have more funds to do so if they did not have to contribute to the California Tree Fruit Agreement's advertising programs.

Petitioner Elliott testified he spends approximately $40,000.00 a year for travel and entertainment — directed primarily to his buyers, going to conventions, market tours and in printing of advertising materials to promote his label, "Mr. Sunshine." (Tr. 3893). Whereas, Kash, Inc. feels it benefits most by "in-store" promotional advertising, by providing samples to consumers in the grocery store. Kash, Inc. finds that "in-store" promotion is substantially better than "generic" advertising. By tasting a sample of the fruit

in the store, the consumer knows what he/she is purchasing and is more likely to purchase Kash Inc.'s fruit. Kash, Inc. has found this to be the best promotional program available. (Tr. 2958-2959).

Kash, Inc. also attempts to secure brand name recognition through the use of stickers which the retailer places on the individual pieces of fruit. Stickers which promote "Kash, Inc." (Ex. No. 318); "Alshir Red Plums" a Kash, Inc. variety (Ex. No. 316); and, "Sweetheart Plums" a Kash, Inc. advertising logo (Ex. No. 317). Kash, Inc. also has printed posters which advertise their "Sweetheart Plums" logo. (Ex. No. 321).

Assuming, arguendo, that the California Tree Fruit Agreement's "generic" advertising program does benefit tree fruit sales, who receives that benefit? The grower and/or handler who minimizes his expenses by ignoring cultural practices, and cuts corners wherever he can, receives the same "benefit" (if any) from the California Tree Fruit Agreement advertising program. Growers who take pride in their product and expend large sums of money in the continual improvement of that product, as do Wileman/Kash, are unable to improve their market position because they are unable to educate the consumer as to their superior product. The handler and/or grower with a mediocre product is thus subsidized by the industry, and the long term interests of the industry are being jeopardized by the United States Department of Agriculture's encouragement of mediocrity.

Furthermore, the Department has not quantified the extent to which the level of advertising implements the "perceived value" of the fruit and how, if any, this perception affects both the relative market share (vis-a-vis, other fruits) and the relationship of sales and the relative market price. The evidence does not contain data reflecting the direct impact of different advertising strategies on profitability and increase sales, if any, attributable thereto, as opposed to population growth and other factors. Without such data, it is difficult to ascertain any compelling governmental interest in the means employed. In other words, the means employed lack justification in this record.

Wileman/Kash argue they should not be required to "carry" their competitors, that is those who might not otherwise be able to make it in the marketplace by promoting their own inferior fruit, although this situation is inherent in many Marketing Order programs. Wileman/Kash's inability to advertise their own labels, while forcing them to associate with the views expressed by the California Tree Fruit Agreement, impacts their First Amendment rights of free speech and association. *P.G.&E. v. P.U.C., supra, Abood, supra; Chicago Teachers Union v. Hudson, supra,* which Respondent likens to "slight infringement." A recognition of the economic results of the complained of regulation negates that the infringement was "slight."

Wileman/Kash's right to speak freely, as individuals and in a commercial setting, to promote their own product must not be stifled by governmental regulation without justification. The message that Wileman/Kash wish to project to the consumer is vital in our "free market economy." *Project 80's. Inc. v. City of Pocatello, et al.*, 587 F.2d 592 (1988). The regulations and the obligations imposed therefrom are not a "narrowly tailored means of furthering a compelling state interest." As the Supreme Court in *Central Hudson, supra*, explained:

> "Commercial expression not only serves the economic interest of the state, but also assists consumers and furthers the societal interest, in the fullest possible dissemination of information. In applying the First Amendment to this area we have rejected the highly paternalistic view that government has complete power to suppress or regulate commercial speech. [P]eople will perceive their

own best interests only if they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them [citation omitted." *Id.*, at p. 561-562.

Assuming, arguendo, a "substantial governmental interest" is herein involved, the United States Department of Agriculture's interest clearly could be served by less restrictive means. For example, although still a violation of Wileman/Kash's First Amendment rights, credits could be applied against the forced "generic" advertising assessments to handlers who engage in a direct brand name specific advertising program, similar to that which exists in the almond, filbert, walnut, olive and raisin Marketing Order regulations.

Although this impinges on Wileman/Kash's rights to be free from associating with or speaking to any subject, as protected by the First Amendment, it more reasonably fits a compromise position between the legislative ends, and the means chosen to accomplish those ends. *Board of Trustees of the State University of New York, supra*, at p. 831. There has been no showing that a more limited regulation would be ineffective. Respondent views the above contention as a disagreement as to how the money should be spent. However, there is no indication in the rulemaking records that the California Tree Fruit Agreement and/or the Committees were to become the final arbiters of fund expenditures. The nonaction (tacit approval of the Secretary) indicates he does not actively engage in such determinations.

Respondent, in its Post-Hearing Brief, argues that Wileman/Kash have no First Amendment rights to refrain from engaging in commercial speech. Respondent's argument implies that the First Amendment, with respect to commercial speech, is applicable only when the government restricts an individual's ability to speak. Respondent's evaluation, although artfully drafted, misapplies the Supreme

Court's analysis of the First Amendment within the context of commercial speech.

As set forth in detail above, the right of freedom of thought and association protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all. As Judge Sloviter recognized in her dissenting opinion in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 58 U.S.L.W. 3513 (1990):

> "Contribution of money to further the projection of a message is a form of speech, see *Buckley v. Valeo*, 442 U.S. 1, 16-17 (1976), and it follows, as the majority recognizes, that mandated contribution of money for purposes of funding advertisements implicates *Frame's* rights against forced speech." *Id.*, at p. 1172.

Respondent argues that Wileman/Kash are not forced to speak; however, such is clearly not the case. Forcing Wileman/Kash to contribute their money to a "generic" advertising program impacts Wileman/Kash's First Amendment guarantees as much, if not more so, than requiring an individual to carry the slogan "live free or die" on their automobile; or, requiring a newspaper to permit other speakers, with whom the newspaper disagrees, to use the newspaper's facilities to spread the speaker's own message or, to force a corporation to disseminate information in direct conflict with the corporation's views (*Pacific Gas & Electric Co. v. Public Utilities Commission of California, supra*); or, to force an employee to finance a dissemination of ideas to which the employee disagrees (*Abood v. Detroit Board of Education, supra*).

Certainly, many of Wileman/Kash's views are commercially motivated, however:

> "Since all speech inherently involves choices of what to say and what to leave unsaid . . . the central thrust of the

First Amendment to prohibit improper restraint on the *voluntary* public expression of ideas . . . there is necessary . . . a concomitant freedom *not* to speak publicly, one which services the alternate end as freedom of speech in its affirmative aspect." [Citing to *Harper & Rowe Publishers, Inc. v. National Enterprises*, 471 U.S. , 105 S.Ct 2218]. *Pacific Gas & Electric Co. v. Public Utilities Commission of California, supra*, at p. 909.

Wileman/Kash, in their testimony, and in the volunteered testimony of other witnesses in support of Wileman/Kash's position, succinctly explained their opposition to the California Tree Fruit Agreement's "generic" advertising program. It was made clear that they are not opposed to advertising. They would spend at least the amount of money they are forced to give the California Tree Fruit Agreement on their own brand label advertising. (Tr. 4148). However, they are unable to advertise to the degree, or in the manner, they feel would benefit their corporations because the California Tree Fruit Agreement extracts their advertising budget for its forced "generic" advertising program. Thus, they are prohibited from speaking in support of their own views or in the promotion of their own product. (Tr. 1714-1716).

Wileman/Kash contend, and have always contended, that the forced "generic" advertising program of the California Tree Fruit Agreement promulgates an untruth. The California Tree Fruit Agreement's "generic" advertising program promotes the idea that all Nectarines, Peaches and Plums, taste the same, which is contrary to the evidence herein and Wileman/Kash are being forced to perpetuate this. (Tr. 2960). Compelling the financing of forced speech, through a program such as the California Tree Fruit Agreement's, "both penalize the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *P.G.&E. v. P.U.C., supra.*

Respondent argues that Wileman/Kash have no ideological disagreement with the content of the California Tree Fruit Agreement advertising program paid for by compelled assessments, and thus they have not raised a First Amendment claim. Yet, Respondent goes on to state that Wileman/Kash are convinced that "generic" advertising does not benefit the industry, clearly setting forth ideological disagreements with the Secretary of Agriculture's "generic" advertising program. Wileman/Kash specifically wish to promote their "Kash, Inc." and "Mr. Sunshine" labels, fruit which they consider to be superior to that marketed by the majority of the tree fruit industry. Wileman/Kash believe that given the opportunity to promote their products through advertising their own brand names, the consuming public will grow to associate their label with the quality consumers generally associate with the brand name "Sunkist" when referencing oranges, lemons, etc. (Tr. 4141).

All Petitioners testified quite convincingly that the California Tree Fruit Agreement's forced "generic" advertising program does nothing to benefit Wileman/Kash. (Tr. 3901, 1815, 2953). In fact, there has been no showing that such a program benefits anyone other than the advertising company employed by the California Tree Fruit Agreement. There is no evidence that handler or grower profits increased significantly and in proportion to the "generic" advertising program in place. "There have been no attitudinal surveys, polls of research studies" conducted to indicate that the California Tree Fruit Agreement's "generic" advertising program benefits tree fruit sales. *Century Communications Corp. v. F.C.C.*, 835 F.2d 292 (D.C. Cir. 1987).

Respondent, in its Post-Hearing Brief, fails to acknowledge that: ". . . speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the

restrictions are no more extensive than necessary to serve that interest." *Central Hudson, supra*, at p. 566.

What is the government's substantial interest? Respondent contends that it is in the interest of the public and the interest of the tree fruit industry to encourage the consumption of agricultural products. But, where is the substantial governmental interest? In *United States v. Frame, supra*, the Court found a substantial governmental interest in salvaging the beef industry. Pursuant to an extensive congressional record, Congress found a substantial interest in preserving the beef industry from the brink of bankruptcy. That same rationale does not exist in the tree fruit industry.

In *Riley v. National Federation Of The Blind Of North Carolina*, 108 S.Ct. 2667 (1988), the Supreme Court struck down a state law limiting the percentage of proceeds a professional fund-raiser could charge for administering a fund-raising event. The professional fund-raiser had been required to disclose the average percentage of gross receipts actually turned over to the charities by the professional fund-raiser for all charitable solicitations conducted in that state within the previous twelve (12) months. The Supreme Court found that the state's asserted substantial interest in dispelling fraud was sufficient only to justify a "narrowly tailored regulation." Striking down the Act, the Court stated:

> ". . . we do not suggest that states must stand by and allow their citizens to be defrauded. North Carolina has an anti-fraud law, and we presume that law enforcement officers are ready and able to enforce it. Further, North Carolina may constitutionally require fund-raisers to disclose certain financial information to the state, as it has since 1981. [Citation]. If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the state to sacrifice speech for efficiency. [Citations]." *Id.*, at p. 2676.

Respondent has failed to establish, nor even convincingly argue, a substantial governmental interest which supports Wileman/Kash being forced to finance a "generic" advertising program which may lawfully impact protected speech. It is incumbent upon Respondent to prove that the interests it seeks to further are real and substantial. *Zauderer v. Office Of Disciplinary Counsel*, 105 S.Ct. 2265 (1985).

A careful analysis of the *Frame* case, *supra*, reveals differences of such substantial impact, that its decision on the Constitutionality question, although persuasive, should not be controlling herein. The Third Circuit specifically stated in that case. "* * * *we find the issue a close one* * * *." (Emphasis added). Were the Third Circuit to have had the facts of the present case, it well might have decided differently.

The Petitioners *differing circumstances* from *Frame, supra*, are reflective of:

(1) As amended, and as here applicable, The Agricultural Marketing Agreement Act *permits* forced paid advertising; the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901-11 (Supp. III, 1985) *requires* (mandates) it.

(2) The Agricultural Marketing Agreement Act was enacted (reenacted) in 1937, and although amended through the years, preceded the passage of the Administrative Procedure Act. The Beef Promotion and Research Act of 1985, did not. The former had many purposes to which authority to advertise was added — the Beef Promotion and Research Act did not — it's principal stated purpose was to strengthen beef's place in the market place through a coordinated program of "self help" promotion and research.

(3) The Beef Promotion and Research Act itself (and thereby Congress) established the rate of assessments.

Neither the Agricultural Marketing Agreement Act or the Marketing Orders do so. *The rate of assessments is determined by the Secretary of Agriculture.*

(4) The Beef Promotion and Research Act makes greater proscription of the conditions of its application and standards guiding regulatory action than does the Agricultural Marketing Agreement Act.

(5) The evidence in the present case relating to Marketing Orders reveals pro-forma and less than attentive oversight as to how the assessments were spent. In the *Frame* case, the court noted particularly, "* * * we find that the amount of government oversight of the program is considerable, and conclude that no law-making authority has been entrusted to the members of the beef industry." Additionally, the court found the relationship between the Secretary and the entities there involved to be a "close one." Also, no contracts for the implementation of any plans could be entered into without the Secretary's approval.

(6) The constitutionality of the Beef Promotion Act was upheld in *Frame* because the Government demonstrated that the Act was adopted to serve compelling state interests, that were ideologically neutral, and could not be achieved through means significantly less restrictive of free speech or associational freedoms. This was recognized as a "heavy burden." The Government has made no such demonstration here, and the reliance of the Respondent upon the rulemaking records whereby the Marketing Orders were amended to provide for forced "generic" advertising gives it little comfort in this regard.

(7) The Beef Promotion Act applies nationwide whereas the forced assessments under Marketing Order's 916 and 917 are applicable to a limited segment of the industry and many in the industry who benefit thereby are not compelled to pay such assessments.

(8) The Court recognized in *Frame* that there was a "*slight incursion*" on Frame's associational and free speech rights. The incursion as to Wileman/Kash is more than slight.

(9) In *Frame* the Court noted:

We find it significant that the Beef Promotion Act expressly prohibits spending for political activity, 7 U.S.C. § 2905(10) ("The order shall prohibit any funds collected by the Board under the order from being *used in any manner for the purpose of influencing governmental action or policy, with the* exception of recommending amendments to the order.").[13] This prohibition on political expenditures *avoids what the Court has identified as what would be a significant incursion on Frame's constitutional rights,* while ensuring that the extent of the interference here is no more than necessary to further the government's interest.

In the case of Wileman/Kash amounts of assessments were used for expenditures which the Court in *Frame* denounced.

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(10) In *Frame,* it was never argued that strict scrutiny was appropriate under the equal protection analysis. These Petitioners have done so.

(11) The dissenting opinion of Circuit Judge Sloviter emphasizes the importance of sifting through proof to ascer-

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Footnote to Quotation:

[13]*In accordance with this mandate, the Order provides, "No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this part," 7 C.F.R. § 1260.169(e), and also requires State beef councils to certify that they have not and will not use funds for the purpose of influencing governmental policy or action, 7 C.F.R. § 1260.201(b)(7).*

tain if the Government has carried its "heavy" burden. Judge Sloviter found it had not, and,

> "• • • • I believe that it is sufficient to rest this dissent on the statute's incompatibility with the principles protected by the First Amendment. Specifically, I believe that the central provision of the Act which assesses a mandatory non-refundable fee for general promotional advertising of the benefits of beef consumption violate Frame's First Amendment right to freedom to refrain from engaging in commercial advertising. Even if the First Amendment rights implicated in this case are not absolute, I believe that the government has failed to show that the scheme is carefully tailored to pose no greater burden than necessary in light of the government interest asserted."

Thus, the Third Circuit Court of Appeals' response was to those challenges relating to: (i) the limits of Constitutional power enumerated in the Federal Constitution; (ii) The free speech and association clauses of the First Amendment; and, (iii) The equal protection and taking without just compensation guarantees incorporated within the Due Process clause of the Fifth Amendment. Although the issues presented in the instant Petition have some similarities to those addressed in *United States v. Frame*, *supra*, a comparison of the Beef Promotion And Research Act to the Agricultural Marketing Agreement Act magnifies the constitutional and factual differences which permeate the Agricultural Marketing Agreement Act and Marketing Orders 916 and 917, both as written and/or as applied.

The Beef Promotion And Research Act, designed to strengthen the beef industry's position in the marketplace, was structured by Congress in a manner to accomplish the promotion of the beef industry while maintaining congressional control by limiting the Secretary of Agriculture's ability to delegate the authority authorized by Congress

through the Beef Promotion Act. (See 7 U.S.C. §§ 2904(1)-(11)). In sharp contrast to the provisions of the Agricultural Marketing Agreement Act, Congress itself, when drafting the Beef Promotion Act, established an assessment rate of one dollar ($1.00) per head of cattle to be paid by cattle producers and importers (7 U.S.C. § 2904(8)(C)). The Beef Promotion Act authorized the creation of a Beef Promotion Operating Committee and a Cattlemen's Beef Promotion And Research Board. Congress set forth the format and duties of the Cattlemen's Board and the Operating Committee, while restricting the Secretary's discretion in selecting the Board and Operating Committee members. The Cattlemen's Board and Operating Committee are expected to administer the regulations promulgated by the Secretary. Congress designated the number of members allowed on both the Board and the Operating Committee, the manner of their selection, and placed limitations on their power and authority.

The Beef Promotion Act divests both the Cattlemen's Board and the Operating Committee of any decisionmaking authority. Further, the Beef Promotion Act mandates that the Secretary of Agriculture *must* approve *all* budgets, plans, expenditures and contracts *before* they can be implemented. (7 U.S.C. §§ 2904(4)(C) and (6)(A)(B)).

In *United States v. Frame*, *supra*, the majority determined that the Beef Promotion Act did not unlawfully delegate legislative authority to the Secretary. That Court found:

> "In the Beef Promotion Act, Congress has done more than provide standards for the administration of the Act; it has set forth with unusual specificity the terms of the Act's implementation. *Most importantly*, Congress itself has set the amount of assessments at $1.00 per head of cattle, 7 U.S.C. § 2904(8)(C). Similarly, Congress has provided detailed procedures for determining the mem-

bership of the Cattlemen's Board and the Operating Committee. *See* 7 U.S.C. § 2904(4)(A)." *Id.*, at p. 16.

The Court further found:

"We find that the amount of government oversight of the program is considerable, and conclude that no lawmaking authority has been entrusted to the members of the beef industry. Both the Act and the Order render the actions of the Cattlemen's Board subject to the Secretary's pervasive surveillance and authority." *Id.*, at pp. 17-18.

The majority in *United States v. Frame, supra*, found no unlawful delegation of legislative authority in the Beef Promotion Act. The Court determined that Congress required the Secretary of Agriculture to retain *and exercise* the ultimate authority in the implementation of rules and regulations and those rules and regulations were not allowed to be delegated to administrative committees of competitors.

The instant matter does not deal with the issue of a committee performing only ministerial functions for the Secretary with respect to the establishment of the advertising budgets and the collection of advertising assessments. Congress has not provided nor established a pre-determined assessment rate within the Agricultural Marketing Agreement Act, instead:

"... Each handler subject [to the Marketing Order] shall pay to any authority or agency established under such Order, such handler's pro-rata share (as approved by the Secretary) of such expenses as a Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may pursuant to such Order determine to be appropriate..." [7 U.S.C. § 610(b)(2)(ii)].

Congress gave the Secretary of Agriculture virtually no guidance nor limitations or restrictions on the expenses

which could be incorporated into the assessments imposed on the tree fruit industry by the Committees and the California Tree Fruit Agreement. Congress also failed to place any limitations on the monetary figure which the Secretary could allow the tree fruit Committees to designate as assessments.

Within the Beef Promotion Act, the Secretary must, per congressional mandate, approve all budgets, plans, expenditures and contracts before they may become effective. (7 U.S.C. §§ 2904(4)(C) and (6)(A)(B)). Such is certainly not the case within the provisions of the Agricultural Marketing Agreement Act. As Jonathan Field, Manager of the California Tree Fruit Agreement, testified in a separate proceeding (In re: *Gerawan Co., Inc.*, AMA Docket Nos. F&V 916-4 and 917-5):

The programs that we have are reviewed by a sub-committee on promotion. The sub-committee, then, makes recommendations as to how we should proceed in developing these programs. That recommendation, then, would go forward to the committees, usually at their May meeting.

At that May meeting, each individual commodity committee, then, will review peaches, plums and nectarines: Will review the programs as indicated, at a joint meeting. Then, at the individual commodity meetings in May, each committee, then, when they approve their budget, makes a special motion to approve the market development program. [Reporter's Transcript, AMA Docket Nos. F&V 916-4 and 917-5, May 31, 1989, at p. 199].

At no time, did Mr. Jonathan Field in his testimony indicate that the Secretary of Agriculture involved himself in any "plans, expenditures and contracts." As a matter of fact, the Secretary of Agriculture does not, in any way, involve himself in the advertising program put forth by the

tree fruit industry. The various tree fruit Committees, with the assistance of the California Tree Fruit Agreement (employees of the Committees), determine what is "good" for the tree fruit industry, determine how much will be spent, contract with advertising agencies, and collect assessments from handlers to fund the decisions and programs the tree fruit Committees impose on the industry.

Respondent contends that all decisions with respect to advertising are sent to the Secretary for approval. Although this is perhaps what was originally intended, and although a certain amount of paper work does go forward to him, it is clear that the Secretary's involvement, is, at best, minimal. For each harvest season 1979 through 1989, the record as a whole shows that the Secretary of Agriculture, with minor exceptions, merely "rubberstamped" a dollar figure budget submitted by the Committees for approval. No details were provided, no prior approval from the Secretary was sought or demanded. (Exh. Nos. 7, A-B. 21 through 32, 33(A) and 33(M)). The availability of information is not the equivalent of its scrutiny.

The Court in *United States v. Frame, supra*, in determining that there was no unlawful delegation of legislative authority to the Secretary of Agriculture, in the provisions of the Beef Promotion Act, made clear that Congress itself set the level of assessments at $1.00 per head of cattle, and Congress itself established detailed procedures for determining membership on the Cattlemen's Board and Operating Committee.

In contrast, the Agricultural Marketing Agreement Act does not establish the level of assessments authorized to be imposed by the Secretary of Agriculture, but leaves to the discretion of the Secretary the task of establishing whatever dollar figure is deemed "reasonable." This partakes of a mere "rubber-stamp" procedure where the Secretary has always approved the proposed budgets of the Committees

with little or no inquiry as to the basis and purpose of those assessments nor any meaningful determination that the imposition of those assessments is reasonable and necessary and would "tend to effectuate the policies of the Act." (Ex. Nos. 7, A.B. 21 through 32, 33(A) and 33(M)).

The majority in *United States v. Frame, supra*, analyzed at length, the forced association and free speech First Amendment issues created as a result of the implementation of the Beef Promotion Act. The majority in *United States v. Frame, supra*, found that: ". . . Compelled contributions to the beef promotion program implicate Frame's right to be free from compelled association." The Court then explained:

> "Accordingly, we will sustain the constitutionality of the Beef Promotion Act only if the government can demonstrate that the Act was adopted to serve *compelling state interests*, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms." *Id.*, at p. 1148.

The majority in *United States v. Frame, supra*, went on to rule that the Government's interest was substantially more than an "interest in advertising beef." The Court determined, based on the extensive congressional record, that without a beef promotion program, not only would the country's beef supply be jeopardized, but our nation's entire economy would be in peril (*United States v. Frame, supra*, at p. 1150). Clearly, with the Court envisioning the collapse of our nation's economic base without the implementation of a beef promotion program, it is not difficult to understand why the Court found a "compelling state interest."

In contrast, however, no such in depth congressional investigation was ever conducted prior to the passage of 7 U.S.C. § 608c(6)(I) authorizing the Secretary, in his discretion, to implement an advertising program. There was no evidence that the national economy would collapse without

commercials imploring consumers to "eat California fruit." In fact, in the Secretary's comments at the time he proposed the creation of a forced "generic" advertising program on the plum industry, his reasoning included:

> "The records show that the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space and retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention, plums should benefit from a promotional program which offers the retailer an attractive quality product which the industry helps sell with an advertising and promotion campaign." (36 Fed. Reg. 8736, May 12, 1971; Exh. No. 7, A.B. 19).

The Secretary's desire to "offer the retailer an attractive quality product" must not be equated with a compelling state interest to preserve our national economy. As Judge Sloviter stated in her dissenting opinion in *United States v. Frame, supra*:

> "While the government has a general interest in the health of the beef industry, it does not follow that the government has a substantial interest in compelling the beef industry to make and support such a promotion campaign . . . the messages represent the economic interest of 'one segment of the population,' . . . thus, not even if the standard by which the government's interest should be evaluated is a 'substantial' interest rather than a 'compelling' one, which the majority uses, I cannot conclude that the government's interest in a program of this kind is sufficiently substantial to permit it to compel speech." *Id.*, at p. 1178.

If mandatory assessments, to keep the beef industry from "decaying" and "to preserve our national economy," are

insufficient reasons, from one judge's viewpoint, to uphold forced "generic" advertising when First Amendment freedoms are infringed upon, certainly the decision to impose mandatory assessments so that the retailer may present an "attractive quality product" would ". . . make a mockery of the First Amendment protection accorded 'the decision of . . . what not to say.' See *Riley*, 108 S.Ct. at 2677." (*United States v. Frame, supra*, at pp. 1181-1182).

The majority in *United States v. Frame, supra*, found that the messages that were promoted by the Federal government were ideologically neutral and sought only to bolster the image of beef for purposes of increased sales. Within the beef industry that may or may not be true, however, such is certainly not the case with the tree fruit industry. As testified to by Petitioners Kashiki (Tr. 4147-4191), Chang (Tr. 2921-2931), and Elliott (Tr. 3881-3910), they are ideologically opposed to the "generic" promotion of tree fruit. Such a program promotes mediocrity within the industry and penalizes growers who provide a better product.

Also, many consumers seek out fruit which has not been sprayed with various pesticides. By forcing a handler to subsidize a "generic" tree fruit advertising program, Wileman/Kash's remaining advertising budget no longer allows them to promote the fact that their particular brand name products are not treated with pesticides. They are unable to provide the "free flow of information" which is essential to allowing the consumer to make an informed decision as to what to buy or not to buy. Therefore, a handler who desires to promote his pesticide-free fruit is precluded, from an economic standpoint, from conveying that message to those who desire that information.

The California Tree Fruit Agreement's "generic" advertising promotional program implies that all fruit, no matter who the grower, is equally nutritious, tasty and healthful. (Tr. 2956). This is not the message Wileman/Kash wish to

convey. Wileman/Kash desire to advertise their labels, to advertise their better quality, to advertise their pesticide-free and/or lack of pesticide residue fruit. They desire to reach the more discerning and/or demanding consumer. It is highly doubtful that forced "generic" advertising is conveying an ideologically neutral message, particularly to those consumers who are seeking more meaningful information than "buy California summer fruit."

The majority in *United States v. Frame, supra*, implied that in evaluating the government's compelling interest, it was necessary to evaluate whether or not significantly burdensome restrictions on free speech and association could be imposed and still satisfy the government's goal of promoting the beef industry. Yet, instead, the Court similarly ruled that it considered the legislation to be a minimum of infringement on Frame's First Amendment rights, with no discussion as to other available alternatives. The Court concluded with respect to this issue that:

> ". . . Although we find that the Beef Promotion Act implicates the First Amendment rights of those obligated to participate, we hold the government has enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the Act in a way which infringes on the contributor's rights no more than necessary to achieve the stated goal." *Id.*, at p. 1155.

The majority gave no explanation how it concluded that the First Amendment infringement was "no more than necessary to achieve the stated goal." Alternatives were not discussed nor alluded to. Perhaps, no less restrictive means were available to achieve the government's "substantial interest." That is not true with respect to the Agricultural Marketing Agreement Act and the imposition of forced assessments to promote its "generic" advertising program. As previously delineated, there are a substantial number of

"less restrictive means" available to achieve the government's goal in promoting the tree fruit industry.

Congress, as it does with other commodities, could have established an advertising format whereby Wileman/Kash would receive a credit against their advertising assessments for expending their own funds to promote their own specific brand names. This would satisfy the government's interest in promoting the tree fruit industry and yet allow Wileman/Kash the freedom of choice as to how to convey their message to the consumer. Further, assuming that the government had a compelling interest in promoting the tree fruit industry, Congress could have established a ceiling as to the amount of assessments applied to "generic" advertising. By so doing, Wileman/Kash could be assured that they would be assessed a fixed amount to be applied towards "generic" advertising, allowing them to use their remaining advertising funds to convey their message to the consumer in whatever manner Wileman/Kash determined to be most effective. This, at first blush, may sound as if it is simply an argument of Petitioners whereby they disagree with the Secretary's policy over discretionary matters. However, it is more than that, because it goes to the substance and legality of such matters.

In consideration of the impact on Wileman/Kash's First Amendment guarantees, Wileman/Kash would urge that the comments of Judge Sloviter in her dissenting opinion be followed.

> "I do not view the compulsion that all sellers of cattle contribute financially to the industry message by proclaiming in Madison Avenue style the value of beef over the radio and television stations of the United States to be a regulatory program.
>
> Of course, trade associations routinely perform such functions, but never before to my knowledge has any Court

held that industry members must be *forced* to contribute to such a program . . . " *United States v. Frame, supra*, at pp. 1171-1172.

Judge Sloviter goes on to state:

". . . I believe that the central provision of the Act which assesses a mandatory non-refundable fee for general promotional advertising of the benefits of beef consumption violates Frame's First Amendment right to freedom to refrain from engaging in commercial advertising. Even if the First Amendment rights implicated in this case are not absolute, I believe that the government has failed to show that the scheme is carefully tailored to pose no greater burden than necessary in light of the government interest asserted." *Id.*, at p. 1172.

The majority in *United States v. Frame, supra*, although discussing Frame's Fifth Amendment equal protection arguments, made short work of rejecting those issues. Frame conceded that no fundamental right was involved, nor did he consider himself placed in a "suspect classification." Therefore, Frame *agreed* that the appropriate basis of review was the "rational or reasonable basis" test. The Court, in *United States v. Frame, supra*, at p. 1156, adopted the District Court's finding that a "rational basis" existed. At Footnote 14, on page 1157, the majority acknowledges that Frame never argued that "strict scrutiny" was appropriate under the equal protection analysis, and therefore neither the District Court nor the Court of Appeals considered whether strict scrutiny would be applicable to Frame's claim, or whether the Beef Promotion Act would pass Constitutional muster under the "strict scrutiny" or "compelling state interest" standard of review. However, it is well settled that when a group is treated differently by the government, in diminution of their fundamental rights, the discriminating legislation must serve a compelling state interest or be invalidated.

Wileman/Kash have no argument with the *rationale* of the majority under the factual scenario presented in *United States v. Frame, supra*. However, Wileman/Kash are asserting that their fundamental rights have been substantially impinged upon by the assessment programs within the legal and factual context of the Agricultural Marketing Agreement Act and the Secretary's Marketing Orders promulgated thereto. The standard of review, when considering the provisions of the Agricultural Marketing Agreement Act and its Marketing Orders, rises above that of "rational basis" scrutiny as was applied in *Frame, supra*, and must be viewed by applying the "strict scrutiny" and "compelling governmental interest" standard of review. Although Wileman/Kash agree with Frame's assertion that others involved in the industry should be required to share in the burden of funding a forced "generic" advertising program, the discrimination within the tree fruit industry extends far beyond what was set forth in *United States v. Frame, supra*. The Beef Promotion Act, although assessing $1.00 per head of cattle sold, which obviously impacted each producer, it did so consistently. The Act encompassed all producers nationally, as well as imposing the identical assessment on all cattle and beef products imported into the United States (7 U.S.C. §§ 2901(b), 2903, 2904(8)(A)-(C)).

The Agricultural Marketing Agreement Act and the Secretary's Marketing Orders fail to equitably apply the assessment burden which is imposed. California handlers are the only handlers in the tree fruit industry forced to support a "generic" advertising program (Appendix "A," Respondent's Stipulated Response Nos. 50, 51 and 52). On its face, 7 U.S.C. § 608(c)(6)(1) discriminates against handlers of "California-grown peaches" in the exercise of their fundamental First Amendment rights. On its face, the Agricultural Marketing Agreement Act treats California handlers differently than handlers in other states.

Although, on its face, the Agricultural Marketing Agreement Act does not discriminate against handlers of Nectarines and Plums, the Secretary of Agriculture in imposing compelled subsidization of a "generic" advertising program only on California handlers creates the same discriminatory classification which exists on the face of 7 U.S.C. § 608(c)(6)(I) with reference to California-grown Peaches. The issues involving alleged violations of the implied equal protection guarantees of the Due Process Clause of the Fifth Amendment are not addressed in detail herein, as any determination, which would be applicable thereto, is not necessary for the resolution of this case.

The majority in *United States v. Frame, supra*, were not faced with a situation such as exists in the tree fruit industry. Had the Beef Promotion Act only assessed producers of cattle sold in Pennsylvania to promote a national beef advertising program, it is likely that the majority would have struck down that Act. Wileman/Kash are faced with just such discriminatory legislation. Respondent has failed to justify why a program which is specifically designed by the Secretary to benefit the tree fruit industry should not be paid for by all those who, in theory and in reality, benefit from such a program. The majority in *United States v. Frame, supra*, discusses Congress' intention to eliminate those who would receive a "free-ride" if support for a beef promotion program was only accomplished through voluntary contributions. Yet. the Agricultural Marketing Agreement Act provides a "free-ride" to all handlers and growers of tree fruit, not only nationally but internationally, with the exception of the California tree fruit handler. Clearly, Wileman/Kash are treated differently than other growers similarly situated in the exercise of their fundamental rights when the only individuals compelled to support a national "generic" advertising program are those doing business in California.

Respondent unconvincingly argues that the forced subsidization of a "generic" advertising program directly benefits the California handlers because it promotes only California tree fruit and the California Tree Fruit Agreement's commercials state "Eat California Summer Fruits." As explained above, without the consumer specifically requesting that the supermarket designate which fruit is California fruit, there is no way to distinguish a California-grown peach from that of any other state or country. Thus, all handlers outside the grasp of the California Tree Fruit Agreement receive a "free-ride" from the promotional program which Wileman/Kash are forced to support. (Tr. 3882).

Wileman/Kash would urge this tribunal to rule that the regulations as set out in 7 C.F.R. §§ 916.45 and 917.39 are a violation of Wileman/Kash's First Amendment rights regarding freedom of speech and association to the extent that said regulations force participation in the California Tree Fruit Agreement's "generic" advertising program.

Because this case has been decided on issues relating to the Secretary's failure to adhere to the provisions of the Administrative Procedure Act, and, thus, Petitioners' grievances can be resolved through statutory provisions, I shall not rule on the First Amendment Constitutional issue. However, if Petitioners were not to succeed in their nonconstitutional arguments, I would rule in their favor on their First Amendment rights.

Attorney's Fees

Title 5, Section 504 provides among other things that an agency that conducts an adversary adjudication *shall award*, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the *adjudicative officer of the agency* finds that the position of the agency as a party to the

proceeding was substantially justified or that special circumstances make an award unjust.

The Petitioners Wileman/Kash contend that pursuant to said provision they are to be reimbursed their legal fees and other expenses. That section applies not only to actions in the Federal District Court, but also to administrative proceedings held pursuant to 7 U.S.C. § 608(c)(15)(A), as Wileman/Kash are unable to proceed to the District Court without first exhausting their administrative remedies through the United States Department of Agriculture. Wileman/Kash contend, and the record as a whole supports that their Petitions were brought in good faith and that they have diligently proceeded in good faith. Moreover, they maintain that Respondent's purported defenses and actions in this case were brought in bad faith, in that the Respondent knew, or should have known, that said asserted defenses lacked merit. These contentions of the Petitioners not only have merit by reason of the legal principles which they have pursued, but they are reflected in the factual circumstances which have surrounded both the *Wileman/Kash I* and *Wileman/Kash II* proceedings: (1) for the first time in eight years, and after the *Wileman/Kash I* hearing, the Department published, among other things, purported rules relating to maturity and appeal procedures; (2) orders were issued from the Department that meetings and relationships previously existing between the Tree Fruit Reserve and the California Tree Fruit Agreement personnel were to be severed and a degree of separateness was to be achieved; (3) the Tree Fruit Reserve went back and reconstructed eight years of Minutes which previously had not been done; (4) the appeal procedures applicable to situations where a handler disagreed with the determinations relative to the maturity of his fruit were substantially revised in the 1988 rules in a manner which precluded the California Tree Fruit Agreement field personnel from being the one who could make the sole determination with respect to maturity of

fruits. Thus, some of the contentions raised in the *Wileman/Kash* proceedings have been sought to be corrected by reason of subsequent actions of the Department. Surely, this reflects that the Petitioners' contentions, indeed, were brought in good faith and based upon an objective view of the situation. As the presiding Administrative Law Judge in both proceedings, I have only commendation for the Petitioners' diligence and thoroughness.

As pointed out by the Petitioners, Respondent was obligated to deal in good faith with Wileman/Kash and to make a concerted and meaningful effort to correct any malfeasance, misfeasance, or legalized oversight conduct that had occurred without putting *Wileman/Kash* to the incredible expense of proving what Respondent knew, or should have known, all along. In addition, there have been or now are pending before the Department of Agriculture a number of section (15)(A) cases, some having some similarity to the issues in this case, reflecting that other handlers are voicing concerns relating to provisions of various Marketing Orders. These Petitioners have conscientiously done everything that was required of them in order to have their grievances administratively adjudicated in an expeditious manner (and under more conducive circumstances, this decision would have been issued 7 or 8 months earlier).

The Petitioners' claim for attorney's fees and expenses is timely and properly pled. Basically, the Respondent contends that the Petitioners failed to indicate any provision of the Agricultural Marketing Agreement Act, the applicable Rules of Practice, or any other authority of the Administrative Law Judge which would authorize the Judge to rule on such a claim in this proceeding.

The Petitioners have sighted numerous cases which would indicate, if not compel, that attorney's fees are not only authorized, but justified: *Washington v. Heckler*, 356 F.2d 959 (3rd Cir. 1985); *Pope v. Railroad Retirement Board*,

744 F.2d 868 (D.C. Cir. 1984); *Ferrell v. Pierce*, 743 F.2d 454 (7th Cir. 1984); *Cornella v. Schweiker*, 728 F.2d 978 (8th Cir. 1984).

Apparently the Department is taking the position that if a Court has reviewed [or will review] the Judicial Officer's decision in a proceeding, only the reviewing Court, rather than the Judicial Officer can award fees and expenses pursuant to a claim therefor. However, it would seem that the Judicial Officer is the final arbiter within the Department to rule on the matter. Since appeal of this decision to a Federal Court is almost certain, it is assumed that Petitioners will engage in the proper procedure to perfect their claim. In this regard, note is made of two recent decisions relating to what constitutes a final judgment: *Jabaay v. Sullivan* 3 AdL.3d 649 (7th Cir. Dec. 17, 1990); and *Meyers v. Sullivan* 3 AdL.3d 670 (11th Cir. Nov. 6, 1990).

The path of this case before the Department has been arduous and resembled an attempt to walk up a steep iced-covered hill. The Petitioners, *Wileman/Kash*, have assiduously pursued their course to obtain timely and effective relief, in the face of obstacles. The Petitioners cause has been just. The issues presented are of moment with respect to the regulatory process and as the Department was admonished in *C&K Manufacturing and Sales Co. v. Yeutter*, 3 AdL.3d 572 (D.C. Cir. Aug. 28, 1990): "Finally, the Court reaches the public interest, perhaps the most important interest in the statutory and regulatory scheme. • • • Obviously, the public has a strong interest in seeing that [the agency] is able to do its job in an unhindered fashion as possible. However, the public also has a strong interest in seeing that [the agency] utilizes proper procedures and reaches correct results as to public safety and health risk. • • • Furthermore, the public has a strong interest in the integrity of the administrative process. No citizen should have to live in fear that its government will be permitted to

stamp out its livelihood without notice and a real opportunity to be heard on the issues raised. This is an interest that [the United States Department of Agriculture] must not ignore."

In addition to the enormous amount of legal work and cost which have been expended in this proceeding over a long period of time, there have been developments which quite likely might not have occurred absent the filing of the Initial Petition in *Wileman/Kash I*. *See*, *Public Citizen Health Research Group v. Young* (D.C. Cir. July 31, 1990) No. 89-5055. In that case, the Petitioners therein became a catalyst which forced the agency to act. In the instant proceeding the Department did act after the good faith filing of the Petition in *Wileman/Kash I* and for the first time in many years published regulations applicable to the 1988 and subsequent harvest years. Nevertheless, it will be noted, inasmuch as this case has been consolidated with *Wileman/Kash I*, that the Government has conceded that prior to 1988 there were no published regulations which made reference to color chips.

There never was a proposed rule regarding the budget and the assessment ever published in the Federal Register until after the *Wileman/Kash I* trial (Tr. 2723) because the Department does not consider same to be rulemaking.

The Secretary, according to AMS's representative, Mr. Kimmel, does not "• • • engage(s) in the decision of how the committees will finance their purchases" or whether such purchases are made by the California Tree Fruit Agreement or the Tree Fruit Reserve. (Tr. 2728). The Secretary just approves them.

These Petitioners, Wileman/Kash, have had *bona fide* grievances emanating from the Marketing Orders. Their efforts to have their contentions administratively adjudicated have taken place over a span of years — with Petition-

ers doing everything required of them. I know of nothing else they could have done, nor anything which they failed to do.

Respondent argues that although errors in administering the Orders may have occurred, and that even if there were to be found some malfeasance by those responsible for administering or spending the assessments funds, the amounts involved are so small as to not justify granting relief to the Petitioners. I am unaware of any provision in the Agricultural Marketing Agreement Act or the Marketing Orders which permits malfeasance to be quantitative in terms of dollars as a measure of the right to have the Orders administered properly and legally.

The Respondent also resists the claim of Petitioners for attorney's fees and expenses under the Equal Access to Justice Act (5 U.S.C. § 504) because Respondent is confident that Petitioners will not prevail and because it is asserted that the position of the Government was justified. It is true that the United States Department of Agriculture believes itself compelled to defend Marketing Order's and their administration and interpretation. Such compulsion does not make Petitioners' claims any less worthy.

The position of the Respondent herein has been very carefully considered and it is recognized that it is consonant with the administration of a program which extends back some 50 years. The regulation of fruits and vegetables under the Agricultural Marketing Agreement Act has been in existence for many years, and is integrated to a certain extent with either preexisting programs which existed in the States prior to the Federal Marketing Orders or which came into being thereafter. It is recognized that the programs are a coordinated effort between the various State programs and the Federal Government. These programs are entrenched both from the passage of years, and by reason of procedures which have existed over a long period of time. It indeed

would have been an easy matter in this case to have indicated that by reason of the time factor and the ingrained procedures which existed relative to the subject Marketing Orders pertaining to the fruit here involved, that the complaints of the Petitioners were simply those reflecting a small minority who are not satisfied with the Orders. I do not believe that this is so. The Petitioners herein have *bonafidely* pursued legal principle which reflect the correctness of their position, particularly with respect to the necessity for adherence to the Administrative Procedure Act. The fact that it has been only in recent years that the legality of some of these Order provisions has been questioned, should not militate against the validity of arguments where it can be shown that the Order provisions are not in accordance with law. There are many reasons why handlers are reluctant to bring Petitions to question the administration and interpretation of Marketing Orders.

There are recent cases which dispel Respondent's position. In a case of first impression, the Ninth Circuit in *Abela v. Gustafson* No. 87-5658, 2 AdL.3d 73 (Nov. 6, 1989) the Court rejected the Government's arguments as to its role in naturalization proceedings being neither litigative nor administrative or that its position was substantially justified. Instead, the Court emphasized that: "Congress enacted the EAJA to prevent overwhelming governmental resources and huge litigation costs from deterring individuals in precisely petitioners' situation from vindicating their rights." In addition, the court found that there were no special circumstances making the award unjust. In fact, an examination by the Court of the agency's slowness and failure to act enhanced the justness of the award. The Ninth Circuit indicated: "The 'Government's 'position' whose justification we must examine is defined by statute to mean 'in addition to the position taken by the United States in the civil action, the action *or failure to act* by the agency upon which the civil action is based' 28 U.S.C. § 2412(d)(2)(D)." (Em-

phasis added). The Ninth Circuit has stated that: 'We look to the record of both the underlying Government conduct at issue and the totality of circumstances present before and during litigation.' *Barry v. Bowen*, 825 F.2d 1330. We hold that the Government's unexplained failure to act on naturalization petitions, which forces petitioners to obtain a court order requiring the Government to calendar the petitioners, is a circumstance of which the court must take cognizance in determining whether to award attorney's fees. This circumstance fits within the statutory definition because it constitutes an agency's failure to act and it precipitates litigation. * * * The record in this case demonstrates that the INS unjustifiable delayed processing and calendaring many of appellees' petitions for naturalization. Many of the petitions have been pending, apparently without action, for two to seven years. The INS in some instances claim that it had delayed processing applications because it was awaiting receipt of transcripts of interviews that had occurred more than three years prior. We hold that the Government's prelitigation protracted delays and failure to act on appellees' petitions, which forced appellees to file a motion with the court to cause the Government to calendar naturalization hearings, were unjustified and the EAJA therefore required the District Court to award attorney's fees to Petitioners."

The record as a whole establishes procedural irregularity and non-compliance with the Administrative Procedure Act to such an extent as to constitute arbitrary and capricious behavior, an abuse of the Secretary's discretion; and substantive regulations formulated and implemented that were not in accordance with law. For this, the Respondent must account by way of returning to Petitioners those amounts derived from them or deprived to them by reason of improper and illegal agency's actions. The lack of regard for the Administrative Procedure Act is rampant and the non-compliance with its provisions obvious. The monetary

amounts associated with the Department's non-compliance with the Administrative Procedure Act and with the Order provisions of which the Petitioners should be relieved, can best be determined in a supplementary hearing wherein the Petitioners would be required to produce generally accepted financial statements. This will also be of advantage to Respondent who can then be in a position to question the veracity of such amounts.

Both parties hereto have submitted numerous proposals, requests, objections, and motions. They have all been duly considered and to the extent, if any, that they may be inconsistent with this Decision and Order they are denied.

For the foregoing reasons the following Order is issued.

ORDER

The Petitioners are to be relieved of the Order obligations of which they complained in their Petition and Amended Petition. The amount of such monetary relief is to be determined at a subsequent date.

This Decision and Order becomes final Thirty-Five (35) days after service thereof unless appealed within Thirty (30) days by a party to the Judicial Officer pursuant to the Rules of Practice and Procedure (7 C.F.R. §§ 900.65, 1.130 *et seq.*).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 24th day May, 1991.

Dorothea A. Baker
Administrative Law Judge